(21,423.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 105.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY PETITIONER,

vs.

ERASTUS W. WILLARD, ADMINISTRATOR OF THE ESTATE OF HAROLD R. WELLMAN, DECEASED.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 30, 1910.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT,

OCTOBER TERM, A. D. 1907.

No. 1426

ERASTUS W. WILLARD, ADMINISTRATOR OF THE ESTATE OF HAROLD R. WELLMAN, DECEASED,

Plaintiff in Error,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY AND CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY,

Defendant in Error.

MR. JOHN T. DONAHOE,
MR. COLL McNAUGHTON,
MR. JAMES A. McKEOWN,
Counsel for Plaintiff in Error.

MR. ALBERT J. HOPKINS,
MR. DAVID J. PEFFERS,
Counsel for Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

1 Pleas in the Circuit Court of the United States for the Northern District of Illinois—Eastern Division, begun and held at the United States Court room, in the City of Chicago, in said District and Division, before the Hon. Francis M. Wright, District Judge of the United States, for the Eastern District of Illinois, on Tuesday, the Ninth day of July, being one of the days of the regular July Term of said Court begun Monday, the first day of July, in the year of our Lord one thousand nine hundred and seven, and of our independence the one hundred and thirty-second year. Placita

H. S. STODDARD,
Clerk.

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2 IN THE CIRCUIT COURT OF THE UNITED STATES,
For the Northern District of Illinois
Eastern Division.

Erastus W. Willard, Administrator of the Estate of Harold R. Wellman, Deceased,
vs.
Chicago, Burlington and Quincy Railroad Company and Chicago, Burlington and Quincy Railway Company. } 28,523

Be It Remembered, that on this day to-wit: the twenty-second day of December, 1906, come the Chicago, Burlington and Quincy Railway Company by its attorneys and filed in the Clerk's office of said Court, a certain Transcript of Record from the City Court of Aurora, in the City of Aurora, in the County of Kane and State of Illinois. Which said Transcript of Record is in the words and figures following to-wit:

3 United States of America,
State of Illinois,
County of Kane,
City of Aurora. } ss.

Pleas before the Honorable John L. Healy, presiding Judge of the City Court of Aurora in the City of Aurora in the county and State aforesaid at a term thereof begun and holden at the Court House in said city on the third Monday, being the 17th day of December in the year of our Lord one thousand nine hundred and six and of the independence of the United States the one hundred and thirty third.

Present—
Honorable John L. Healy, Judge of the City Court of Aurora.
Robert Burke, Sheriff,
Frank Reid, States Attorney.

Attest:
FRANK W. GREENAWAY,
Clerk.

Court Opened by Proclamation in due form of law.

Be it remembered that heretofore on to-wit: the 16th day of March A. D. 1906 there was filed in the office of the clerk of the City Court of Aurora, the same being a court of record in and for the City of Aurora, in the County of Kane and the State of Illinois, a certain praecipe for summons which said praecipe was and is in the words and figures following to-wit:

State of Illinois,
County of Kane,
City of Aurora. } ss

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City Court of Aurora, Kane County.

March Term, A. D. 1906.

Erastus W. Willard, administrator of the estate of Harold R. Wellman,
Plaintiff,

vs.

Chicago, Burlington & Quincy
4 Railroad Company and the Chicago, Burlington & Quincy Railway Company,
Defendants,

The clerk of said court will issue a summons, in the above cause, directed to the sheriff of Kane County, in a plea of case returnable at the March term of said court, A. D. 1906, to the damage of the plaintiff of ten thousand dollars.

DONAHOE, MCNAUGHTON and MCKEOWN and RAYMOND & NEWHALL,
Plaintiff's Attorney.

To F. W. Greenaway, Esq., Clerk,
Mch 16, 1906.

(Endorsed on the back) Praecipe for Summons. G. D. No. City Court of Aurora, March Term, 1906. Erastus W. Willard, Admr. vs. C. B. & Q. Ry. Co. et al. Filed this 16th day of March, A. D. 1906. Frank W. Greenaway, Clerk. Donahoe, McNaughton & McKeown and Raymond & Newhall, Plaintiff-Attorney.

And afterwards on to-wit the said 16th day of March, A. D. 1906, there was issued out of the office of the clerk of the City Court of the City of Aurora in and for the county and state aforesaid a certain writ of summons which said writ was and is in the words and figures following to-wit;

sued 1906.

State of Illinois,
County of Kane, } ss.
City of Aurora.

The people of the State of Illinois to the Sheriff of said County Greeting:

We command you that you summon Chicago, Burlington & Quincy Railroad Company and the Chicago, Burlington & Quincy Railway Company if they shall be found in the city of Aurora in your county, personally to be and appear before the city court of Aurora in said county, on the first day of the next term thereof, to be holden at the court house, in the city of Aurora in said County, on the 4th Monday of March next, to answer unto Erastus W. Willard, administrator of the estate of Harold A. Wellman in a plea of case to the damage of said plaintiff as he say- in the sum of ten thousand dollars.

And have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness, Frank W. Greenaway, Clerk of our said Court, and the seal thereof, at Aurora aforesaid, this 16th day of March A. D. 1906.

FRANK W. GREENAWAY,
(Seal) *Clerk.*

State of Illinois,
County of Kane, } ss.

sum- ed 6, 1906.

Served the within writ or summons on the Chicago, Burlington & Quincy Railroad Company and the Chicago, Burlington and Quincy Railway Company by reading the same to C. H. Simcosky, chief clerk of the Superintendent at Aurora, Ill. and by delivering true copies thereof at the same tim efor each corporation to him this 16th day of March 1906. The presi-

dent of the company of said corporations not found in this county.

ROBERT BURKE,
Sheriff
By J. M. KENNEDY,
Deputy.

(Filed March 26, 1906, Frank W. Greenaway, Clerk of the City Court of Aurora, Kane County, Illinois.

Declara
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And afterwards on to-wit: the said 16th day of March A. D. 1906, there was filed in the office of the said city court of Aurora a certain declaration of the plaintiff herein which said declaration was and is in the words and figures following to-wit:

State of Illinois
County of Kane, } ss.
City of Aurora,

In the City Court thereof,

March Term, A. D. 1906.

6 Erastus W. Willard, administrator of the estate of Harold R. Wellman,
Plaintiff,
vs.
Chicago, Burlington & Quincy Railroad Company, and Chicago, Burlington & Quincy Railway Company,
Defendants,

Erastus W. Willard, plaintiff, administrator of the estate of Harold R. Wellmand, deceased, who died intestate by Donahoe, McNaughton & McKeown and Raymond & Newhall, his attorneys, complains of the Chicago, Burlington & Quincy Railroad Company and Chicago, Burlington & Quincy Railway Company, defendants, of a plea of trespass on the case;

For that whereas, the defendants, in the life time of the said Harold R. Wellman, to-wit: January 3, 1906, in the county of Cook in the state of Illinois, were possessed of and using

ed 1906. and operating a certain railroad, extending through a part of the county aforesaid, and were also then and there possessed of a certain locomotive engine, with a certain train of cars then attached thereto which said locomotive engine and train of cars were then and there under the care and management of divers servants of the defendants, who were then and there driving the same upon and along the said railroad, near and towards a certain crossing of the said railroad, in a certain public highway there, to-wit; a certain public highway commonly known as Harlem avenue in the village of Berwyn in said county, and while the said Harold R. Wellman, with all due care and diligence, was then walking across said railroad track, at the said crossing, upon said public highway there, the defendants then and there by their said servants so carelessly and improperly drove and managed the said locomotive engine and train, that by and through the negligence and improper conduct of the defendants, by their said servants in that behalf, the said locomotive engine and train then and there run and struck with great force and violence, upon and against the said Harold R. Wellman, whereby the said Harold R. Wellman was then and there and thereby killed and the plaintiff avers that the said Harold R. Wellman left him surviving ..... Wellman, his widow, and ..... his children and next of kin, who are still living, and that by reason of the death of said Harold R. Wellman as aforesaid, the said widow and children have been and are deprived of their means of support, and that the said children have been, and are deprived of their means of support and education.

7

And the plaintiff brings into court here letters of administration to him granted by the probate court of the county aforesaid which give sufficient evidence to the court here of the granting of administration of the said estate to the plaintiff, etc. to the damage to the plaintiff of ten thousand dollars.

ERASTUS W. WILLARD,
Administrator of the estate of Harold R. Wellman, deceased.
by DONAHOE, MCNAUGHTON & MCKEOWN and RAYMOND & NEWHALL,
his attorneys.

Filed March 16, 1906, Frank W. Greenaway, Clerk of the City Court of Aurora, Kane County, Illinois.

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And afterwards to-wit: the 26th day of March, A. D. 1906, there was filed in the office of the said clerk of the city court of Aurora a certain petition for removal to the United States Circuit Court for the northern district of the state of Illinois, and eastern division thereof which said petition was and is in the words and figures following to-wit:

State of Illinois
County of Kane, } ss
City of Aurora.

In the City Court of Aurora.

To the March Term, A. D. 1906.

Erastus W. Willard, administrator of the estate of Harold R. Wellman,
vs.
Chicago, Burlington & Quincy
8 Railroad Company and Chicago, Burlington & Quincy Railway Company.

To the Honorable the Judge of the City Court of Aurora, Kane County. State of Illinois.

The petition of the above named defendant, the Chicago, Burlington & Quincy Railway Company, respectfully shows unto this honorable court the following: That the above entitled suit is brought by the plaintiff to recover of the said defendants the sum of ten thousand ($10,000) dollars for alleged wrongfully causing the death of said Harold R. Wellman, deceased, and is wholly of a civil nature; that the matter and amount in dispute between this defendant and the said plaintiff in said suit exceeds exclusive of interest and costs, the sum or value of two thousand ($2000) dollars, all of which will more fully appear by the declaration in said suit which is hereby referred to and made a part hereof.

That there is in said suit a controversy which is wholly between citizens of different states and which can be fully determined between them, to-wit, between your petitioner, the Chicago, Burlington & Quincy Railway Company, one of the defendants in said suit and the plaintiff in said suit, that this defendant, the Chicago, Burlington & Quincy Railway

1906. Company, is a foreign corporation and was at the time of the commencement of said suit and still is a non-resident of the state of Illinois, and was at the time of the commencement of said suit and still is a corporation duly formed, created and organized and by virtue of the laws of the state of Iowa, solely and was at the time of the commencement of said suit and still is a citizen and resident of the state of Iowa, having its principal place of business in the city of Burlington in the said state of Iowa; that the said Erastus Willard administrator of the estate of Harold R. Wellman, deceased, and the plaintiff herein was at the time of the commencement of said suit and still is a citizen and resident of the state of Illinois.

Your petitioner further shows to the court that the
9 Chicago, Burlington & Quincy Railroad Company, a corporation organized under the laws of the state of Illinois was prior to the month of November, 1901, the owner of and operating the railroad, tracks, engines and cars described in the declaration in this case, that in the month of November, 1901, the said Chicago, Burlington & Quincy Railroad Company leased to this defendant, the Chicago, Burlington & Quincy Railway Company, a corporation organized under the laws of the state of Iowa, solely and a citizen of the said state of Iowa, as aforesaid, all of its lines of railway, rights, privileges, franchises, rights of way, yards, stations, tracks and all appliances thereunto belonging for a period of ninety-nine (99) years from September 30, 1901, and including in said lease that part of said Chicago, Burlington & Quincy Railroad Company in the County of Cook, State of Illinois, described in the said declaration and all of its property, rights, tracks, appliances and appurtenances; that the said Chicago, Burlington & Quincy Railroad Company, the lessor in said lease, further leased and assigned to this defendant the lessee in said lease, all other real and personal property not hereinbefore mentioned and all the rights privileges, immunities and franchises of the lessor, except the lessor's franchise to be a corporation; that since December 21, 1901, and on the day of the alleged injury and death of the plaintiff's intestate, Harold R. Wellman, and at the present time, this defendant has operated and was and is now operating, controlling and managing the lines of railway of the said Chicago, Burlington & Quincy Railroad Company, the lessor in said lease.

This petitioner further shows unto your honor that on Jan-

uary 3, 1906, the said Chicago, Burlington & Quincy Railroad Company, defendant in this cause, was not possessed of, using or operating the railroad engine and cars described in the declaration and had not for a long time prior thereto nor since said date.

This petitioner further shows unto your Honor that on said date January 3, 1906, the said defendant Chicago, Burlington & Quincy Railroad Company, was not possessed of the certain locomotive engine, and train of cars described in said declaration or any or either of them, nor was it in possession of said appliances for a long time prior thereto or since said date. Petitioner further shows unto your honor the said locomotive engine and train of cars or any or either of them, were not under the care or management of any servants of the said defendant, the Chicago, Burlington & Quincy Railroad Company nor was the said defendant, the Chicago, Burlington & Quincy Railroad Company then and there driving the same along and upon the railroad described in the declaration, but on the contrary petitioner states that this defendant, the Chicago, Burlington & Quincy Railway Company, was then and there solely in possession, control and management of the said railroad described in said declaration, and of the locomotive engine and train of cars described therein, and was then and there in the sole control, management and operation of the said locomotive engine and train of cars described in the declaration. Petitioner further shows that the servants and employees in charge of said locomotive engine and train, and then and there operating the same, were the employees and servants solely of the defendant, the Chicago, Burlington & Quincy Railway Company and not otherwise.

This petitioner further shows to the court that the said defendant the Chicago, Burlington & Quincy Railroad Company, was at the time of the commencement of said suit and long prior thereto a corporation organized under the laws of the state of Illinois and a citizen of the said state of Illinois, and was fraudulently and improperly joined as a party defendant in this cause for the sole purpose of defeating the right of this petitioner to remove said cause to the United States Circuit Court for the northern district of Illinois and eastern division thereof.

This petitioner further shows unto your honor that the time by which this defendant is required by the laws of the

1906. state of Illinois and the rules and practice of this court to answer or plead in this suit, has not yet expired; that
11 defendant comes and files herein a bond in the sum of five hundred ($5000.00) dollars with good and sufficient security for its entering in the circuit court of the United States for the Northern District of Illinois, Eastern division, on the first day of the next session a copy of the record in this suit and for paying all costs that may be awarded by said circuit court of the United States if it shall hold that this suit was wrongfully or improperly removed thereto.

Wherefore, this defendant prays this court to proceed no further herein except to accept this petition and bond and to make order requiring said defendant to enter and file a copy of the record herein in the said circuit court of the United States for the northern district of Illinois, Eastern division as provided by law.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY,
By JOSEPH A. CONNELL,

State of Illinois, } ss
County of Cook, }

Joseph A. Connell, being first duly sworn upon oath deposes and says that he is one of the attorneys for the said defendant, the Chicago, Burlington & Quincy Railway Company that he is authorized to make and execute this petition and does so in behalf of said defendant, that he has read said petition and knows the contents thereof and that the statement and allegation therein contained are true.

JOSEPH A. CONNELL.

Subscribed and sworn to before me this 22nd day of March A. D. 1906.

J. H. PETTIBONE,
(Seal) *Notary Public.*

Filed March 26, 1906, Frank W. Greenaway, Clerk of the City Court of Aurora, Kane County, Illinois.

12 And afterwards on to-wit: the said 26th day of March, A. D. 1906, there was filed in the office of the said clerk of the said city court of Aurora, a certain bond for removal as aforesaid which bond was and is in the words and figures following to-wit: Bond file 190

Know all men by these presents, That, we, The Chicago, Burlington & Quincy Railway Company, a corporation, as principal and Illinois Surety Company, of the city of Chicago, in the County of Cook and State of Illinois as surety, are held and firmly bound unto Erastus W. Willard, administrator of the estate of Harold R. Wellman, and all other persons whom it may concern, in the penal sum of five hundred dollars, lawful money by the United States for the payment of which well and truly to be made, we bind ourselves and our heirs, executors or administrators, jointly and severally and firmly by these presents.

Whereas, the Chicago, Burlington & Quincy Railway Company, principal above named, has petitioned the City Court of Aurora, in the State of Illinois for the removal of a certain suit therein pending, wherein the said Erastus W. Willard, administrator of the estate of Harold R. Wellman, is plaintiff and the said, The Chicago, Burlington & Quincy Railway Company and the Chicago, Burlington & Quincy Railroad Company are defendants, into the circuit court of the United States for the Northern District of Illinois, Eastern Division.

Now therefore, the condition of this obligation is such that if the above bounden the Chicago, Burlington & Quincy Railway Company, shall enter in such circuit court of the United States on the first day of its next session a copy of the record in such suit, and shall pay all costs which may be awarded by said circuit court, if said circuit court shall hold that such suit was wrongfully or improperly removed thereto and shall also appear in said circuit court and enter special bail in such cause if special bail was originally required therein, and shall do such other appropriate acts as by the Act of Congress in that behalf are required to be done upon the
13 removal of such suit from said state court into the United States court, then this obligation to be void otherwise of force.

oval, 26,

Witness our hands and seals, this 22nd day of March, 1906.

THE CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY,
By D. WILLARD (Seal)
Vice-Pt.

ILLINOIS SURETY COMPANY, (Seal)
By EDWIN M. McKINNEY,
Attorney in fact.

(Seal)
Countersigned
W. HERBERT STREART,
Secretary.

POWER OF ATTORNEY FROM ILLINOIS SURETY COMPANY TO EDWIN M. McKINNEY.

Know all men by these presents:

That the Illinois Surety Company, a corporation duly incorporated under the laws of the State of Illinois, and duly authorized to act as sole surety, in pursuance of the following resolution which was passed by the board of directors of the company at a meeting held November 27, 1905, to-wit:

"Resolved, That the president, vice president or an acting president, is hereby authorized, empowered and directed to make an appoint such agents and execute such powers of attorney, to accept process for and on behalf of this company, or to authorize the said attorneys and agents to execute bonds, undertakings or writings obligatory in the nature thereof, for and on behalf of this company as shall be needful, and to the same extent and effect as though said appointments were severaly made by separate action of the board of directors in each instance, and the secretary and assistant secretary is hereby authorized, empowered and directed to authenticate such appointments, affixing the corporate seal of the company to the same" as made, constituted and appointed,

and by these presents doth make, constitute and appoint
14 Edwin M. McKinney, of the city of Chicago, State of Illinois, its true and lawful attorney in fact, with full power and authority, together with the secretary or assistant secretary of said company, to sign, seal, acknowledge and deliver in its name, place and stead, as surety, bonds, undertakings or writings obligatory in the nature thereof, and when said bonds, undertakings or writings obligatory are signed by

said Edwin M. McKinney as attorney in fact, and countersigned by the secretary or assistant secretary of said company, to bind the company as fully and to the same extent as if the said bonds, undertakings or writings obligatory in the nature thereof, were executed by the executive officers of this company at its home office in the city of Chicago, State of Illinois, and the company thereby ratifies and confirms all that its said attorney in fact may do or lawfully cause to be done in the premises by virtue of these presents. Bond file 190

In testimony whereof, the Illinois Surety Company has caused these presents to be signed by its vice president attested by its secretary and its corporate seal to be hereunto affixed, this tenth day of November, 1905.

ILLINOIS SURETY COMPANY,
By A. J. HOPKINS,
Vice President.

(Seal)

Attest:
W. HERBERT STEWART,
Secretary.

State of Illinois }
County of Cook. } ss.

I, J. Howard Cahill, a notary public in and for the county and state aforesaid, do hereby certify that A. J. Hopkins, vice president and W. Herbert Stewart, secretary of the Illinois Surety Company, who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument as such vice president and secretary, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument of writing as their free and voluntary act and as the free and voluntary act of said Illinois Surety Company, for the uses and purposes therein set forth, and caused the corporate seal of said company to be thereto attached.

15 Given under my hand and notarial seal, this 28th day of November, 1905.

J. HOWARD CAHILL,
Notary Public.

(Seal)

I, Herbert Stewart, secretary of the Illinois Surety Company do hereby certify that the above is a true copy of the original power of attorney.

noval, 26,

In Testimony whereof, I have hereunto set my hand and affixed the seal of the company this 22d day of March A. D. 1906.

W. HERBERT STEWART,
Secretary.

(Seal)

State of Illinois
Seal
Insurance Department.

Springfield, November 21, 1905.

Whereas, the Illinois Surety Company, of the city of Chicago, in the state of Illinois, has furnished the insurance superintendent due proof that such company is possessed of the qualifications specified in the act of the general assembly of the state of Illinois, entitled, "An Act to enable corporations created for that purpose to transact a surety business in this state, and to become the surety of bonds required by law" approved June 8, 1897, now

Therefore, I, William R. Vredenburgh, insurance superintendent of the state of Illinois, by virtue of authority in me vested by law, do hereby certify that said company is qualified and is authorized to do business under the said act for the ensuing year, ending January 31, 1906.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of my office at Springfield, the day and year first above written.

WILLIAM R. VREDENBURGH,
Insurance Superintendent.

(Seal)

Filed March 26, 1906, Frank W. Greenaway, Clerk of the City Court of Aurora, Kane County.

16 And afterwards on to-wit: the 26th day of March A. D. 1906 the same being one of the days of the regular March A. D. 1906 term of the said City Court of Aurora, the following among other proceedings were had and entered of record in the said City Court of Aurora to-wit:

Erastus Willard, Admr. etc.
vs.
Chicago, Burlington & Quincy Railroad Company, et al. } Case.

Orde 26,

This day comes the defendant herein the Chicago, Burlington & Quincy Railway Company and files its petition to remove this cause to the United States Circuit Court. On motion of the plaintiff it is ordered that leave be and is hereby given the plaintiff to amend the return of the sheriff on the summons issued and filed herein.

And afterwards to-wit: the 17th day of September A. D. 1906 the same being one of the days of the regular September A. D. 1906 term of the said City Court of Aurora, the following among other proceedings were had and entered of record in the said court to-wit:

Erastus Willard, Admr, etc.
vs.
Chicago, Burlington & Quincy Railroad Co. et al. } Case.

This day this case is set for trial by jury.

And afterwards on to-wit, the 17th day of November A. D. 1906, the same being one of the days of the regular September A. D. 1906 term of the said City Court of Aurora the following among other proceedings were had and entered of record in the said court to-wit:

Orde 190

17 Erastus Willard, Admr. etc.
vs.
Chicago, Burlington & Quincy Railroad Company, et al. } Case.

On motion of the defendant herein the Chicago, Burlington & Quincy Railway Company on said defendant filing herein its petition and bond as required by law, it is ordered that this cause as to said defendant, Chicago, Burlington & Quincy Railway Company be and the same is hereby transferred to

the Circuit Court of the United States in and for the northern district of Illinois eastern division, and that the clerk of this court be and he is hereby ordered forthwith to transmit to the said Circuit Court of the United States in and for the Northern district of the State of Illinois, Eastern Division full and complete transcript of all papers and pleadings filed in the said cause together with all the orders and other proceedings made and entered of record herein.

State of Illinois }
County of Kane, } ss.
City of Aurora. }

I, Frank W. Greenaway, Clerk of the City Court of Aurora, the same being a Court of Record, in and for the City of Aurora in the County and State aforesaid, do hereby certify that the within and foregoing is a true, correct and complete copy of all the proceedings entered of record in said court in a certain cause recently therein pending on the common law side thereof, wherein Erastus Willard, Admr. of the estate of Harold R. Wellman was plaintiff and Chicago, Burlington & Quincy Railroad Co, the Chicago, Burlington & Quincy Railway Co, were the defendants.

In Witness Whereof, I have this 13th day of December A. D. 1906, hereunto set my hand and affixed the seal of said Court at the office thereof in Aurora.

FRANK W. GREENAWAY,
(Seal) *Clerk of said Court.*

(Endorsed) Filed Dec. 22, 1906, Marshall E. Sampsell, Clerk.

18 And afterwards to-wit: on the twenty-fourth day of December, being one of the days of the regular December term of said court, 1906, in the record of proceedings hereof in said entitled cause before the Hon. Kenesaw M. Landis, District Judge, appears the following entry to-wit:

ORDER OF DECEMBER 24, 1906.

Order 1906.

Motion to remand to State Court heard in part and postponed until Wednesday morning next.

Erastus W. Willard, Admr. etc.
vs.
Chicago, Burlington & Quincy Rd. Co. et al } 28523

Now come the parties by their attorneys and thereupon the motion of the plaintiff to remand this cause to the State Court is heard in part and postponed until Wednesday morning next.

19 And afterwards to-wit; on the twenty-sixth day of December, being one of the days of the regular December term of said court, 1906, in the record of proceedings thereof in said entitled cause before the Hon. Kenesaw M. Landis, District Judge, appears the following entry to-wit: Order 1906.

ORDER OF DECEMBER 26, 1906.

Leave given to withdraw motion to remand and to amend declaration by filing additional counts instanter.

Erastus W. Willard, Admr, etc.
vs.
Chicago, Burlington & Quincy Railroad Company, et al. } 28523.

Now again come the parties by their attorneys and now comes on to be heard the motion of the plaintiff to remand this cause to the State Court of Kane County, and the same being further heard, leave is given the plaintiff to withdraw said motion and amend said declaration by filing additional counts instanter, and the defendants are ruled to plead to said amendments within ten days.

counts tion, 26, 20 And on the same day to-wit, the twenty sixth day of December, 1906 come the plaintiff in said entitled cause by his attorneys and filed in the clerk's office of said court certain additional counts to the declaration in words and figures following to-wit:

ADDITIONAL COUNTS TO DECLARATION.

IN THE CIRCUIT COURT OF THE UNITED STATES

Within and for the Northern District of Illinois—

Eastern Division.

December Term, A. D. 1906.

Erastus W. Willard, Administrator of the estate of Harold R. Wellman, deceased,
Plaintiff,
vs.
Chicago, Burlington & Quincy Railroad Company and Chicago, Burlington & Quincy Railway Company,
Defendants,
28523

Additional Counts to plaintiffs declaration, leave to file the same having been first had and obtained.

Erastus W. Willard, administrator of the estate of Harold R. Wellman, deceased, who died intestate, by Donahue, McNaughton & McKeown, his attorneys, complains of the Chicago, Burlington and Quincy Railroad Company, and the Chicago, Burlington & Quincy Railway Company, defendants of a plea of trespass on the case;

For that whereas heretofore, to-wit, on the third day of January A. D. 1906, and for a long time prior thereto, the Chicago, Burlington and Quincy Railroad Company owned a certain railroad extending through portions of the counties of Cook and Kane and other counties in the state of Illinois, and had before the date last aforesaid, leased said railroad to the defendant, the Chicago, Burlington & Quincy Railway Company, which said Chicago, Burlington & Quincy Railway

Company from thence forward, and on the date aforesaid, Additional to declaration filed 1906.
21 ran and operated locomotive engines and trains of cars attached thereto, for the conveyance of goods and passengers for reward.

Plaintiff further avers that said railroad crosses and intersected a certain public highway at Berwyn, to-wit, in the county of Kane, aforesaid, commonly called Harlem Avenue.

And the said Chicago, Burlington & Quincy Railway Company being so engaged in running and operating said railroad was on, to-wit, the date last aforesaid, at Berwyn, to-wit; in the county of Kane, aforesaid, possessed of a certain locomotive engine, with a certain train of cars attached thereto, which said locomotive engine and train of cars were then and there being run and operated in an easterly direction over, along and upon said railroad, and over and across said Harlem Avenue, and in so doing no bell of at least thirty pounds' weight, or steam whistle on said locomotive was rung or whistled by the engineer or fireman thereof, at the distance of at least eighty rods from the said crossing, and kept ringing or whistling until said crossing was reached by the said locomotive engine, by means whereof, the defendant, the Chicago, Burlington & Quincy Railway Company, wholly failed and made default, contrary to the form of the Statute in such case made and provided; by means and in consequence of which default and neglect of the defendant, the Chicago, Burlington & Quincy Railway Company, as aforesaid, the said locomotive engine, then and there ran and struck, with great force and violence upon and against the body and person of plaintiff's intestate who was before that time, and then crossing said railroad, on the line of said Harlem Avenue, in the exercise of ordinary care and caution for his own safety, and said intestate then and there and thereby suffered such injuries as then and there caused his death.

And plaintiff avers that the said Harold R. Wellman, left him surviving, Victoria Wellman, his widow and Willard Wellman, his son and next of kin, who are still living, and that by reason of the death of the said Harold R. Wellman, as aforesaid, the said widow and said son, have been and are deprived of their means of support, and that the said
22 Willard Wellman, had been, and is deprived of his manes of support and education.

And the plaintiff brings into court here the letters of administration to him granted by the Probate Court of the

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county of Cook which give sufficient evidence to the court here of the grant of administration of the said estate to the plaintiff, etc.

2. And whereas also, heretofore to-wit, on the third day of January, A. D. 1906, and for a long time prior thereto, the defendant, the Chicago, Burlington & Quincy Railroad Company, was the owner of a certain railroad, roadbed and right of way, extending from the city of Chicago, in the county of Cook, State of Illinois, westward to and beyond the city of Aurora, in the county of Kane, State of Illinois, and had long prior to the date; last aforesaid, leased said railroad, roadbed and right of way to the defendant, the Chicago, Burlington & Quincy Railway Company, and said railroad was on the date last aforesaid, and for many years prior thereto, had been operated by the said Chicago, Burlington & Quincy Railway Company, that said railroad on the date last aforesaid, and for a long time prior thereto, passed through the villages of Berwyn and Riverside, to-wit, in the county of Kane aforesaid, that the territory within the corporate limits of said Berwyn was continguous to the territory within the corporate limits of said Riverside, the westerly limits of the said Berwyn being the easterly limits of the said Riverside; that a public highway, known as Harlem avenue, running in a northerly and southerly direction the center line of which constituted the western boundary of said Berwyn and the easterly boundary of said Riverside was intersected and crossed by said railroad, roadbed and right of way thereof, almost at right angles; that said railroad at the time and place aforesid, and for long time prior to the date last aforesaid, and for a considerable distance to the east and to the west of said Harlem avenue, consisted of three main tracks, running parallel to each other, and in close proximity to each other, to-wit, within the distance of six feet of each other; that the villages of Berwyn and Riverside aforesaid, on the date aforesaid,
and for several years prior thereto, had each a popula-
23 tion of approximately three thousand inhabitants; that
about one half of the population in each of said villages resided on the northerly side of said railroad and the other half on the southerly side thereof; that a large percentage of the adult male inhabitants of the said villages of Berwyn and Riverside to-wit, twenty-five per cent. thereof, for many years prior to and on the date last aforesaid, were employed in Chicago, Illinois, or in suburbs lying between Chicago afore-

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said, and Berwyn aforesaid, on the line of said railroad, the greater number of whom were conveyed to and from their work on cars and trains run and operated over and along said railroad that at the time aforesaid, and for a long time prior thereto, all of the depot buildings and platforms in the said villages of Berwyn and Riverside, used by the company operating said railroad, were located on the south side of the said railroad tracks and roadbed, one of said depot buildings being then and there, and for a long time before that time, situated immediately east of, and adjoining the highway known as Harlem Avenue aforesaid, and from which a large number of the patrons of said railroad took passage on the trains being operated thereon, at least one half of whom were required to pass over and across the three railroad tracks of said railroad to do so, that on the line of said railroad between the depot station, known as Berwyn, in the said villages of Berwyn and Riverside, a distance of about two miles, on, to-wit, the date aforesaid, and for many years prior thereto, crossings were provided across said railroad for the accommodation of the inhabitants of said villages to the number of to-wit, three only, that at the date aforesaid, and for a long time prior thereto, a surface or street railway crossed said railroad and railroad tracks in said Harlem Avenue, at grade with said railroad upon and along which said street railway, and across said railroads tracks then and for a long time prior thereto, were daily run electric cars every fifteen minutes, between six o'clock in the morning and eleven o'clock in the afternoon, in which said electric cars were then and before that time, carried and conveyed large numbers of passengers; that the said Harlem Avenue was then, and
24 for many years before that time had been one of the principal streets intersected and crossed by said railroad in said villages of Berwyn and Riverside.

Plaintiff further avers that on the date aforesaid, the defendant the Chicago, Burlington & Quincy Railway Company, lessee of the defendant, the Chicago, Burlington & Quincy Railroad Company, as aforesaid, ran and operated said railroad, and the locomotive engines, cars and trains for the conveyance of goods and passengers for reward, between Chicago, Illinois, and the western line of the state of Illinois, on the line of said railroad running through a portion of the counties of Cook, Kane and other counties in the state of Illinois; that the defendant the Chicago, Burlington

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& Quincy Railway Company, in the use, management and operation of said railroad, caused a large number of freight and passenger trains to pass over, along and upon said railroad and across said Harlem Avenue, at the point where the same was intersected and crossed by said railroad, to-wit, the number of one hundred fifty passenger trains every twenty four hours, and to-wit, one hundred fifty freight trains every twenty four hours, that between the hours of eight o'clock and ten o'clock in the morning, on the date last aforesaid, and on every day of the year for many years before that time, a freight or passenger train passed over said Harlem Avenue at the point where the same was intersected and touched by said railroad, along and upon said railroad, every five minutes, about one-half thereof, then and there running in an easterly direction, and the other half thereof, in a westerly direction; that between eight o'clock and ten o'clock in the morning, of the day aforesaid and of every day for a long time prior thereto, hundréds of people in vehicles and on foot, going to and from work, and going to and from the depot station at said Harlem Avenue, crossed said Harlem Avenue, all of which conditions were then and there well known to the defendants, and each of them.

Plaintiff further avers that the defendant, the Chicago, Burlington and Quincy Railway Company was then and there possessed of a certain locomotive engine with a certain train of cars attached thereto, which said locomotive engine and train of cars, the said Chicago, Burlington & Quincy Railway Company caused to be run and operated, over, along and upon the south tracks of said railroad, in an easterly direction, towards the city of Chicago, aforesaid, and then and there caused said locomotive engine and train of cars to be stopped at the Harlem Avenue station aforesaid, for the purpose of receiving passengers; that the said Chicago, Burlington & Quincy Railway Company was also then and there possessed of a certain other locomotive engine and train of cars attached thereto, which said locomotive engine and train of cars last aforesaid, the said Chicago, Burlington & Quincy Railway Company, caused to be run and operated over, along and upon the middle track of said railroad, in an easterly direction towards the city of Chicago, aforesaid, and to pass said Harlem Avenue, station at a time when the locomotive engine and train of cars first above mentioned, were at a stand still for the purpose of receiving passengers, at said

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Harlem Avenue station, as aforesaid, that on the date last aforesaid, at Berwyn, to-wit, in the county of Kane, aforesaid, plaintiff's intestate was proceeding from his home on the north side of the railroad, roadbed and tracks of said railroad, towards and across said railroad, roadbed and tracks in said Harlem Avenue, and while said intestate was proceeding south on said Harlem Avenue, across said railroad, tracks and roadbed of said railroad, for the purpose of taking passage in the train of the said Chicago, Burlington & Quincy Railway Company, then and there at the Harlem Avenue station, as aforesaid, in the exercise of ordinary care and caution for his own safety, the said Chicago, Burlington & Quincy Railway Company, so carelessly, negligently and improperly managed and drove said locomotive engine and train of cars lastly above mentioned, over, along and upon the middle track of said railroad, that by, through and in consequence of the carelessness and negligence and improper conduct of the said Chicago, Burlington & Quincy Railway Company in that behalf, said locomotive engine, last aforesaid, struck plaintiff's intestate, at the crossing of said railroad with said Harlem Avenue while said intestate was seeking to cross said Harlem Avenue, in the exercise of ordinary care and caution for his own safety, as aforesaid, thereby then and there inflicting upon the body and person of said intestate, such injuries, as then and there caused his death.

26 And plaintiff avers that the said Harold R. Wellman left him surviving, Victoria Wellman, his widow, and Willard Wellman, his son, as next of kin, who are still living, and that by reason of the death of the said Harold R. Wellman, as aforesaid, the said widow and child have been and are deprived of their means of support, and that the said Willard Wellman has been, and is deprived of his means of support and education, and said next of kin have suffered pecuniary injury and loss,

And plaintiff brings into court here the letters of administration to him granted by the Probate Court of the county of Cook, which give sufficient evidence to the court here of the grant of administration to said plaintiff, etc.

3. And whereas also heretofore, to-wit, on the third day of January, A. D. 1906, and for a long time prior thereto, the defendant, the Chicago, Burlington & Quincy Railroad Company was the owner of a line of railroad, extending from the city of Chicago, County of Cook, State of Illinois, to and be-

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yond the city of Aurora in the county of Kane, and State of Illinois, and through the villages of Berwyn and Riverside, to-wit; in the county of Kane aforesaid, that on the date last aforesaid, and for a long time prior thereto, at the villages of Berwyn and Riverside, aforesaid, said railroad consisted of three main tracks, running parallel to each other, and within, to-wit, six feet of each other, that the course of said railroad and tracks through the villages of Berwyn and Riverside, aforesaid, was then and now nearly due east and west, that about one-half of the territory within the corporate limits of said villages of Berwyn and Riverside was then and now is situated on the north, and the other half on the south side of said railroad; and the population of said villages of Berwyn and Riverside was then, by said railroad about equally divided, one-half of the residences and inhabitants thereof, living on the north side of said railroad, and the other one-half on the south side thereof; that the population of each of said villages on the date aforesaid, and for many years prior thereto, was approximately three thousand inhabitants to each village;
27 that the villages of Berwyn and Riverside, aforesaid, are contiguous to each other, the eastern limits of said Riverside being the western limits of said Berwyn, said Common limit being a line, coinciding with the center line of a public highway there situated, commonly called Harlem Avenue; that on the date last aforesaid, and for many years prior thereto, only four crossings were maintained for the convenience of the traveling public over said railroad, between the depot station at Berwyn, aforesaid, and the Riverside station, aforesaid, on the line of said railroad, a distance of to-wit, two miles, that one of the crossings so maintained across said railroad company was on the line of Harlem Avenue, aforesaid, which was one of the principal highways used by the inhabitants of the villages of Berwyn and Riverside, aforesaid, and the public generally; that a surface or street railway was then and for a long time prior thereto had been maintained ran and operated along said Harlem Avenue, and across said railroad over, along and upon which said street railroad, electric cars for the conveyance of passengers and conveying large numbers of passengers, were run, and propelled daily at intervals of fifteen minutes apart; that on the line of said railway in the village of Berwyn, there were then and there and for a long time prior thereto, maintained two depot stations, the most easterly of which was then and there called Berwyn,

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and the most westerly was then and there called Harlem Avenue station, the latter of which was situated at, and immediately north of said Harlem Avenue crossing, that many of the inhabitants and residences in that section of the villages of Berwyn and Riverside, lying north of said railroad, were then and before that time employes in the city of Chicago and suburbs lying between Chicago aforesaid, and said Berwyn station, and said inhabitants so being employed, had occasion on the day aforesaid, and for many years prior thereto, daily to be transported and carried on the trains and cars operated on said railroad, to and from Chicago, aforesaid, from the said Harlem Avenue station; that between the hours of six and ten o'clock in the morning of the day aforesaid, and on every day in the year, and for many years prior thereto, large numbers of people on foot, on horseback and
28 in vehicles, had occasion to pass over, and did pass over said railroad and the tracks thereof on the line of said Harlem avenue, in going to and from work, and to and from their places of business, all of which conditions were then and there well known to the said defendants, and to each of them.

Plaintiff further avers that on the date aforesaid, and for a long time prior thereto, said railroad was being run and operated by the defendant, the Chicago, Burlington & Quincy Railway Company, as the lessee of, and under a lease thereof, executed to it, and the defendant, the Chicago, Burlington & Quincy Railroad Company; that in the use management and operation of said railroad, the defendant, the Chicago, Burlington & Quincy Railway Company caused a very large number of passengers and freight trains to be run over, along and upon said railway, and over and across said Harlem Avenue crossing, to-wit, one hundred fifty passenger trains daily, and one hundred fifty freight trains daily.

And plaintiff further avers that good railroading and a proper regard for the lives and limbs of the inhabitants of said villages of Berwyn and Riverside, and the public generally, on the date aforesaid, and for many years prior thereto, required that the defendant, the Chicago Burlington & Quincy Railway Company should employ a watchman or maintain gates or other adequate means to warn and protect the traveling public using said Harlem avenue crossing, from the danger to life and limb, due to the frequent running of locomotive engines and trains over and across said

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Harlem avenue crossing; yet the said defendant, the Chicago, Burlington & Quincy Railway Company, wholly regardless of its duty in the premises, carelessly and negligently caused a locomotive engine with train of cars then attached thereto, then and there being used and operated by the said Chicago, Burlington & Quincy Railway Company to be run and operated over, along, and upon said railroad, and over and across said Harlem avenue, where said railroad then crossed the same at a high and dangerous rate of speed, to-wit, at the speed of sixty miles per hour said locomotive engine and
29 train of cars being then and there run and operated at said high and dangerous rate of speed, over and across said Harlem avenue crossing, at a time when said locomotive engine and train of cars would, if running upon the time advertised and scheduled by the said Chicago, Burlington & Quincy Railway Company, have been at a point many miles east of, to-wit, ten miles east of said Harlem avenue crossing, and at a time, when said Chicago, burlington & Quincy Railway Company had caused a certain other train, consisting of a locomotive engine and cars, then and there being run and operated by it on said railroad, to be stopped and to be at a stand still at said Harlem avenue station, and adjoining said crossing, for the purposes of receiving and discharging passengers and in so doing, said defendant, the Chicago, Burlington & Quincy Railway Company failed and neglected to employ a flagman, use gates or other means for the protection of the traveling public, then and there using said crossing, by means whereof, while plaintiff's said intestate, who then and before that time, resided and lived in Riverside, aforesaid, on the north side of said railroad track, was in the act of crossing said railroad track on the line of said Harlem avenue, for the purpose of becoming a passenger on the train then stopped at said Harlem Avenue station, as aforesaid, in the exercise of ordinary care and caution for his own safety, said locomotive engine and train of cars first above mentioned, so ran and operated by the defendant, the Chicago, Burlington & Quincy Railway Company, at a high and dangerous rate of speed, as aforesaid, was run over and against the body and person of plaintiff's said intestate, then and there and thereby inflicting upon said intestate such injuries, as then and there caused his death.

And the plaintiff avers that the said Harold R. Wellman

left him surviving, Victoria Wellman, his widow, and Willard Wellman, his son, as next of kin, who are still living, and that by reason of the death of the said Harold R. Wellman, as aforesaid, the said widow and son have been and are deprived of their means of support, and that the said Willard Wellman has been and is deprived of his means of support and education, and have suffered pecuniary injury and loss.

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And the plaintiff brings into court here, the letters of administration to him granted by the probate court of the county of Cook, aforesaid, which give sufficient evidence to the court here, of the grant of administration to said plaintiff, etc.

4. And whereas also, heretobefore, towit, on the third day of January, A. D. 1906, and for a long time prior thereto, the defendant, the Chicago, Burlington & Quincy Railroad Company was the owner of a certain railroad extending from the city of Chicago, in the county of Cook, State of Illinois, westerly to and beyond the city of Aurora, in the county of Kane, and state of Illinois, and had long before the date last aforesaid, leased said railroad to the defendant, the Chicago, Burlington & Quincy Railway Company; and the said railroad was on the date last aforesaid, and for many years prior thereto, had been run and operated by the said Chicago, Burlington & Quincy Railway Company, for the conveyance of passengers and goods for reward; that said railroad, on the date last aforesaid, and for many years before that time passed through the villages of Berwyn and Riverside, to-wit: in the county of Kane, aforesaid, that the territory lying within the corporate limits of said village of Berwyn was then and now is contiguous to the territory lying within the corporate limits of said village of Riverside, the westerly limits of said Berwyn, being the easterly limits of said Riverside; that a public highway, commonly called Harlem Avenue, running in a northerly and southerly direction, the center line of which then constituted the westerly boundary line of said Berwyn, and the easterly boundary line of said Riverside was intersected and crossed by said railroad almost at right angles; that said railroad at the time and place aforesaid, and for a long time prior to the date last aforesaid, and for many miles to the east and to the west of said Harlem Avenue, consisted of three main tracks running parallel to

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each other, and in close proximity to each other, to-wit: within six feet of each other; that the said villages of Berwyn and Riverside on the date aforesaid, and for several years before that time each had a population of approximately three thousand inhabitants; that about one half of the popu-
31 lation in each of said villages then resided on the northerly side of said railway, and the other half on the southerly side thereof that a large percentage of the adult male inhabitants of the said villages of Berwyn and Riverside, to-wit, twenty five per cent. thereof, for many years prior thereto, and on the date last aforesaid, were employed in the city of Chicago, aforesaid, or in suburbs lying between Chicago aforesaid and Berwyn aforesaid, on the line of said railroad, the greater number of whom were daily conveyed to and from their work on cars and trains ran and operated over, along and upon said railroad; that on the date last aforesaid and for a long time before that time, all of the depot buildings and platforms in the said villages of Berwyn and Riverside, used for receiving and discharging passengers were located on the south side of the tracks and roadbed of said railroad one of said depot buildings being then and there, and for a long time prior thereto, situated immediately north of and ajoining the highway known as Harlem Avenue, aforesaid, and from which a large number of the passengers of said railroad daily took passage on trains being operated thereon, one-half of whom were required to pass over and across the three railroad tracks of said railroad to do so, that on the line of said railroad between the depot station known as Berwyn in the said village of Berwyn and the Riverside station, in the said village of Riverside a distance of approximately, two miles, on to-wit, the date last aforesaid, and for many years prior thereto, few crossings were provided or maintained across said railroad, for the accommodation of the inhabitants of said villages and the public generally, to-wit, the number of four only, that a surface or street railway, many years before said date and then had been, and was constructed and maintained across said railroad in said Harlem Avenue, at grade with said railroad, upon and along which said street railway, and across said railroad tracks, then and for a long time before that time, electric cars were run and operated every fifteen minutes, between the hours of six o'clock in the morning and eleven o'clock in the afternoon, in which said electric cars, were car-

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ried and conveyed, large numbers of passengers; that said
32 Harlem Avenue was then, and for many years prior to the date last aforesaid, had been one of the principal streets intersected and crossed by said railroad, in the said villages of Berwyn and Riverside, and was used very extensively by the inhabitants of said villages of Berwyn and Rievrside and the public generally for highway purposes.

Plaintiff further avers that on the date aforesaid, the defandant the Chicago, Burlington & Quincy Railway Company, lessee of the defendant, the Chicago, Burlington & Quincy Railroad Company, as aforesaid, ran and operated locomotive engines, cars and trains over, along, and upon said railroad, and over and across said Harlem avenue, for the conveyance of goods and passengers for reward; that the defendant, the Chicago, Burlington & Quincy Railway Company, so being engaged in the operation of said railroad, and in the use and management thereof, caused a large number of freight and passenger trains to pass over, along and upon said railroad, and over and across said Harlem Avenue, at the point where the same was so intersected and crossed by said railroad, to-wit; the number of one hundred fifty passenger trains daily, and to-wit, the number of one hundred fifty freight trains daily, that between the hours of eight o'clock and ten o'clock in the forenoon on the date last aforesaid, and on every day of the year for many years before that time, a freight or passenger train ran and operated by the defendant, the Chicago, Burlington & Quincy Railway Company, passed over, along and upon said railroad, and over and across said Harlem avenue, at the point where the same was intersected and touched by said railroad, approximately every five minutes, about one-half of which trains were then and there caused to run in an easterly direction, and the other half thereof, in a westerly direction; that bewtween eight o'clock and ten o'clock in the forenoon on the date aforesaid, and for a long period of time prior thereto, large numbers of people in vehicles, on horseback and on foot going to and from work, and going to and from business and going to and from the depot station at said Harlem Avenue crossed said Harlem Avenue on the line of said railroad and railroad tracks, all of which conditions
33 were then and there, and for a long time before that time well known to the said defendants, and to each of them.

Plaintiff further avers that in the management and operation of locomotive engines, cars and trains, along and upon

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said railroad, and over and across said Harlem Avenue, crossing, with a proper regard for the lives and limbs of the inhabitants of the said villages of Berwyn and Riverside, and the public generally, and in an ordinarily careful and prudent manner, it was the duty of the defendant, the Chicago, Burlington & Quincy Railway Company to so run and operate said locomotive engines, cars and trains, and to so guard and protect the traveling public, at said Harlem Avenue crossing, as not to expose the inhabitants of said villages, the public generally, and such persons as might have occasion to pass over and along said Harlem Avenue at the crossing of said railroad therewith, to unnecessary hazard and danger, Yet the said defendant, the Chicago, Burlington & Quincy Railway Company, wholly rehardless of its duty in that behalf, then and there carelessly and negligently caused a locomotive engine with train of cars attached thereto, to be run and operated, over, along and upon the middle track of said railroad in an easterly direction, towards the city of Chicago, aforesaid, and over and across said Harlem Avenue at a high and dangerous rate of speed, to-wit, at the rate of sixty miles per hour, and in so doing failed and neglected to employ a flagman, use gates or other means for the purpose of warning and protecting such of the public as were then and there using said Harlem Avenue, at the crossing of said railroad therewith, and at a time when the said Chicago, Burlington & Quincy Railway Company, in the management and operation of said railroad, and its locomotive engines, cars and trains thereon, had caused a certain other locomotive engine and train of cars attached thereto, to be stopped and to be at a stand still for the purpose of receiving and discharging passengers at Harlem Avenue station, aforesaid. By means whereof, while plaintiff's intestate was proceeding from his home on the north side of said railroad, towards and across said rail-
34 road, along said Harlem Avenue in the exercise of ordinary care for his own safety, for the purpose of taking passage on the train then standing at said Harlem Avenue station as aforesaid, said locomotive engine and train of cars attached thereto, first above mentioned, so being run and operated by the said Chicago, Burlington & Quincy Railway Company, over, along and upon the middle track of said railroad, as aforesaid, in an easterly direction, as aforesaid, and over and across said Harlem Avenue, as aforesaid, at the high and dangerous rate of speed aforesaid, hit and struck said

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intestate, with great force and violence, then and there and thereby inflicting upon the body and person of said intestate, such injuries, as then and there caused his death.

And the plaintiff avers that the said Harold R. Wellman, left him surviving, Victoria Wellman, his widow, and Willard Wellman, his son, as next of kin, who are still living, and that by reason of the death of the said Harold R. Wellman, as aforesaid, the said widow and son have been and are deprived of their means of support, and that the said Willard Wellman, has been and is deprived of his means of support and education and have suffered and sustained pecuniary injury and loss.

And plaintiff brings into court here, the letters of administration to him granted by the Probate Court of the county of Cook, aforesaid, which give sufficient evidence to the court here of the grant of administration to said plaintiff, etc.

5. And whereas also, heretofore, to-wit, on the third day of January, A. D. 1906, and for a long time prior thereto, the defendants were possessed of, and were using and operating a certain railroad extending from the city of Chicago, in the county of Cook, westerly through a portion of the said county of Cook, to and beyond the city of Aurora, in, to wit, the county of Kane, in the state of Illinois and which said railroad passed through the villages of Berwyn and Riverside in, to-wit, the county of Kane, aforesaid, and
35 the said defendants, being so possessed of said railroad, and being engaged in the operation thereof, were further possessed of a certain locomotive engine with a train of cars attached thereto, which said locomotive engine and train of cars the said defendants caused to be run and operated over, along and upon said railroad, and over and across a certain public highway at Berwyn, aforesaid commonly called Harlem Avenue.

And plaintiff avers that on the date aforesaid, at Berwyn, to-wit: in the county of Kane, aforesaid, said Harlem Avenue, at the point where the same was crossed by said railroad, was used very extensively by the inhabitants of the villiages of Berwyn and Riverside, in, to-wit, the county of Kane, aforesaid, and by the public generally traveling in vehicles, on horseback and on foot, and in street cars, along and upon a surface street railway at grade with said railroad; that it thereupon became, and it was the duty of the said defendants, in the use, management and operation of said railroad, and

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in running and operating said locomotive engine and train of cars attached thereto, to so use and manage said railroad, and to so run and operate said locomotive engine and train of cars, as not to expose plaintiff's intestate or persons then and there using said Harlem Avenue, at the crossing of said railroad therewith; or the public generally, to unnecessary hazard and danger, Yet the said defendants, wholly regardless of their duty in that behalf, carelessly and negligently ran and operated said locomotive engine and train of cars over, along and upon said railroad, at a high and dangerous rate of speed, to-wit, at the rate of sixty miles, per hour, without first providing a means to advise said intestate and the public generally of the approach to said locomotive engine and train of cars to, towards and across said Harlem Avenue crossing, and at a time when the said defendants knew or could have known, by the exercise of ordinary care on their part, or on the part of either of them, that said railroad at said Harlem Avenue, was being used extensively by the traveling public; by means whereof, while said intestate was passing along and upon said Harlem Avenue, at the point 35½ where the same was then and there intersected and crossed by said railroad, in the exercise of ordinarly care and caution for his own safety, said locomotive engine with train of cars attached thereto, as aforesaid, in consequence of the carelessness and negligence of the said defendants, as aforesaid, was run over and against the body and person of said intestate, with great force and violence, then and there and thereby inflicting upon said intestate, such injuries, as then and there caused his death.

And the plaintiff avers that the said Harold R. Wellman, left him surviving, Victoria Wellman, his widow, and Willard Wellman, his son and next of kin, who are still living, and that by reason of the death of the said Harold R. Wellman, the said widow and said son have been and are deprived of their means of support, and the said Willard Wellman, has been and is deprived of his means of support and education, and have suffered pecuniary injury and loss.

And plaintiff brings into court here the letters of administration to him granted by the probate court of the county of Cook, aforesaid, which give sufficient evidence to the court here of the granting of administration to said plaintiff, etc.

6. And whereas also, heretofore, on, to-wit, the third day of January, A. D. 1906, and for a long time prior thereto, the

Chicago, Burlington & Quincy Railroad Company owned a certain railroad extending through portions of the counties of Cook and Kane, and other counties in the State of Illinois; that the defendant, the Chicago, Burlington & Quincy Railway Company, on the date last aforesaid, and for a long time prior thereto, ran and operated said railroad and locomotive engines and trains of cars attached thereto, for the conveyance of goods and passengers for reward, over and upon said railroad. Plaintiff further avers that said railroad crossed and intersected a certain public highway, at Berwyn, to-wit, in the county of Kane, aforesaid, commonly called Harlem Avenue.

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36 And the said Chicago, Burlington & Quincy Railway Company being so engaged in running and operating said railroad was, on, to-wit, the date last aforesaid, at Berwyn, to-wit, in the county of Kane, aforesaid, possessed of a certain locomotive engine, with a certain train of cars attached thereto, which said locomotive engine and train of cars were then and there being run and operated in an easterly direction over, along and upon said railroad, and over and across said Harlem avenue, and in so doing, no bell of at least thirty pounds' weight, or steam whistle on said locomotive engine was rung or whistled by the engineer or fireman thereof, at the distance of at least eighty rods from said crossing, and kept ringing or whistling until said crossing was reached by said locomotive engine but therein, the defendant, the Chicago, Burlington & Quincy Railway Company wholly failed and made default, contrary to the form of the statute in such case made and provided; by means, and in consequence of which default and neglect of the defendant, the Chicago, Burlington & Quincy Railway Company, as aforesaid, the said locomotive engine, then and there ran and struck with great force and violence upon and against the body and person of plaintiff's intestate, who was before that time, and then crossing said railroad on the line of said Harlem Avenue, in the exercise of ordinary care and caution for his own safety and said intestate then and there and thereby suffered such injuries as then and there caused his death.

And plaintiff avers that the said Harold R. Wellman left him surviving Victoria Wellman, his widow and Willard Wellman, his son and next of kin, who are still living, and that by reason of the death of the said Harold R. Wellman, as aforesaid, the said widow and said son have been and are deprived

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of their means of support, and that the said Willard Wellman has been and is deprived of his means of support and education, and said next of kin have suffered and sustained pecuniary injury and loss.

And plaintiff brings into court here, the letters of administration to him granted by the probate court of the county
37 of Cook, aforesaid, which give sufficient evidence to the court here of the grant of administration to said plaintiff, etc.

7. And whereas also heretofore, to-wit, on the third day of January A. D. 1906, and for a long time prior thereto, the defendant, the Chicago, Burlington & Quincy Railroad Company, was the owner of a certain railroad, roadbed and right of way, extending from the city of Chicago, in the county of Cook and State of Illinois, westward to and beyond the city of Aurora, in the county of Kane, state aforesaid, and which said railroad was on the date last aforesaid, and for many years prior thereto, had been operated by the said Chicago, Burlington & Quincy Railway Company; that said railroad on the date last aforesaid, and for a long time prior thereto, passed through the villages of Berwyn and Riverside, to-wit, in the county of Kane aforesaid, that the territory within the corporate limits of said Berwyn was contiguous to the territory within the corporate limits of said Riverside, the westerly limits of said Berwyn being the easterly limits of the said Riverside; that a public highway, known as Harlem Avenue, running in a northerly and southerly direction, the center line of which constituted the westerly boundary of said Berwyn and the easterly boundary of said Riverside, was intersected and crossed by said railroad, roadbed and right of way thereof, almost at right angles, that said railroad at the time and place aforesaid, and for a long time prior to the date last aforesaid, and for a considerable distance to the east and to the west of said Harlem Avenue, consisted of three main tracks, running parallel to each other, and in close proximity to each other, to-wit, within the distance of six feet of each other; that the villages of Berwyn and Riverside, aforesaid, on the date aforesaid, and for several years prior thereto, had each a population of approximately three thousand inhabitants; that one-half of the population in each of said villages resided on the northerly side of said railway and the other half on the southerly side thereof; that a large percentage of the adult male inhabitants of the said villages

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of Berwyn and Riverside to-wit, twenty-five per cent. thereof, for many years prior to, and on the date last aforesaid,
38 were employed in Chicago, Illinois, or in suburbs lying between Chicago aforesaid, and Berwyn aforesaid, on the line of said railroad, the greater number of whom were conveyed to and from their work on cars and trains run and operated along and over said said railroad; that at the time aforesaid, and for a long time prior thereto, all of the depot buildings and platforms in the said villages of Berwyn and Riverside, used by the company operating said railroad, were located on the south side of said railroad tracks and roadbed, one of said depot buildings being then and there, and for a long time before that time, situated immediately east of, and adjoining the highway known as Harlem avenue, aforesaid, and from which a large number of the patrons of said railroad took passage on the trains being operated thereon, at least one half of whom were required to pass over and across the three railroad tracks of said railroad to do so, that on the line of said railroad between the depot station, known as Berwyn, in the said villages of Berwyn and Riverside, a distance of about two miles, on to-wit, the date aforesaid, and for many years prior thereto, crossings were provided across said railroad for the accommodation of the inhabitants of said villages and the traveling public, to the number of, to-wit three only; that at the date aforesaid, and for a long time prior thereto, a surface or street railway crossed said railroad and railroad tracks in said Harlem avenue at grade with said railroad, upon and along which said street railway, and across said railroad tracks, then and for a long time prior thereto, were daily run electric cars every fifteen minutes, between six o'clock in the morning, and eleven o'clock in the afternoon, in which said electric cars were then and before that time carried and conveyed, large numbers of passengers; that the said Harlem avenue was then and for many years before that time, one of the principal streets intersected and crossed by said railroad in said villages of Berwyn and Riverside.

Plaintiff further avers that on the date aforesaid and for a long time prior thereto, the defendant, the Chicago, Burlington & Quincy Railway Company ran and operated said railroad, and locomotive engines cars and trains for the con-
38½ veyance of goods and passengers for reward between Chicago, Illinois, and the western line of the state of Illi-

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nois, on the line of said railroad, running through a portion of the counties of Cook, Kane and other counties in the state of Illinois; that the defendant, the Chicago, Burlington & Quincy Railway Company, in the use, management and operation of said railroad, then and there caused a large number of freight and passenger trains to pass over, along and upon said railroad, and across said Harlem avenue, at the point where the same was intersected and crossed by said railroad, to-wit, the number of one hundred fifty passenger trains, every twenty four hours, and, to-wit, one hundred fifty freight trains every twenty-four hours; that between the hours of eight and ten o'clock in the morning, on the date last aforesaid, and on every day of the year for many years before that time, a freight or passenger train passed over said Harlem avenue, at the point where the same was intersected and touched by said railroad along and upon said railroad, every five minutes, about one half thereof then and there running in an easterly direction, and the other half thereof, in a westerly direction; that between eight and ten o'clock in the morning, of the day aforesaid, and of every day for a long time prior thereto, hundreds of people in vehicles and on foot, going to and from work, and going to and from the depot station at said Harlem avenue, crossed said Harlem avenue crossing, all of which conditions were then and there well known to the defendants, and each of them.

Plaintiff further avers that the defendant, the Chicago, Burlington & Quincy Railway Company, was then and there possessed of a certain locomotive engine with a certain train of cars attached thereto, which said locomotive engine and train of cars, the defendant, the Chicago, Burlington & Quincy Railway Company, caused to be run and operated over, along and upon the south tracks of said railroad, in an easterly direction, towards the city of Chicago, aforesaid, and then and there caused said locomotive engine and train of cars
39 to be stopped at the Harlem avenue station aforesaid, for the purpose of receiving passengers; that the said Chicago, Burlington & Quincy Railway Company was also then and there possessed of a certain other locomotive engine and train of cars attached thereto, which said locomotive engine and train of cars last aforesaid, the said Chicago, Burlington & Quincy Railway Company, caused to be run and operated over, along and upon the middle track of said railroad, in an easterly direction, towards the city of Chicago, afore-

said, and to pass said Harlem avenue station, at a time when the locomotive engine and train of cars first above mentioned, were at a standstill for the purpose of receiving passengers, at said Harlem avenue station as aforesaid, that on the date last aforesaid, at Berwyn, to-wit, in the County of Kane, aforesaid, plaintiff's intestate was proceeding from his home on the north side of the railroad, roadbed and tracks of said railroad, towards and across said railroad, roadbed and tracks in said Harlem avenue across said railroad, tracks and roadbed, of said railroad, for the purpose of taking passage in the train of the said Chicago, Burlington & Quincy Railway Company, then and there, at the Harlem avenue station as aforesaid, in the exercise of ordinary care and caution for his own safety, the said Chicago, Burlington & Quincy Railway Company, so carelessly, negligently and improperly managed and drove said locomotive engine and trian of cars above mentioned, over, along and upon the middle track of said railroad, as aforesaid, that by through and in consequence of the carelessness, negligence and improper conduct of the said Chicago, Burlington & Quincy Railway Company, in that behalf, said locomotive engine last aforesaid, struck plaintiff's said Intestate, at the crossing of said railroad with said Harlem avenue, while said intestate was seeking to cross said Harlem avenue, in the exercise of ordinary care and caution for his own safety, as aforesaid, thereby then and there inflicting upon the body and person of said intestate, such injuries as then and there caused his death.

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And plaintiff avers that the said Harold R. Wellman left him surviving, Victoria Wellman, his widow and Willard Wellman his son, and next of kin, who are still living, and that by reason of the death of the said Harold R. Wellman, as aforesaid, the said widow and said child have been and are deprived of their means of support, and that the said Willard Wellman has been and is deprived of his means of support and education, and said next of kind have suffered pecuniary injury and loss.

And plaintiff brings into court here the letters of administration to him granted by the probate court of the county of Cook, aforesaid, which give sufficient evidence to the court here of the granting of administration to said plaintiff, etc.

8. And whereas also, heretofore, to-wit, on the third day of Janurary A. D. 1906, and for a long time prior thereto, the defendant, the Chicago, Burlington & Quincy Railroad

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Company was the owner of a line of railroad extending from the city of Chicago, County of Cook, state of Illinois, to and beyond the city of Aurora, in the county of Kane, and state of Illinois, and through the villages of Berwyn and Riverside, to-wit, in the county of Kane, aforesaid, that on the date last aforesaid, and for a long time prior thereto, at the villages of Berwyn and Riverside, aforesaid, said railroad consised of three main tracks running parallel to each other and within to-wit, six feet of each other, that the course of said railroad and tracks through the villages of Berwyn and Riverside, aforesaid, was then and now is nearly due east and west, that about one half of the territory within the corporate limits of said villages of Berwyn and Riverside was then and now is situated on the north, and the other half on the south side of said railroad, and the population of said villages of Berwyn and Riverside was then by said railroad about equally divided, one half of the residences and inhabitants thereof living on the north side of said railroad, and the other one half on the south side thereof; that the population of each of said villages on the date aforesaid, and for many years prior thereto, was approximately three thousand inhabitants to each village, that the villages of Berwyn and Riverside aforesaid, are contiguous to each other, the eastern limits of said Riverside being the western limits of said Berwyn,
41 said common limit being a line coinciding with the center line of a public highway there situated, commonly known as Harlem avenue; that on the date last aforesaid, and for many years prior thereto, only four crossings were maintained for the convenience of the traveling public over said railroad between the depot station at Berwyn aforesaid, and the Riverside station, at Riverside, aforesaid, on the line of said railroad, a distance of, to-wit, two miles that one of the crossings so maintained across said railroad company, was on the line of said Harlem avenue, aforesaid, which was one of the principal highways used by the inhabitants of the villages of Berwyn and Riverside, aforesaid, and the public generally, that a surface or street railway was then and for a long time prior thereto had been maintained, ran and operated along said Harlem avenue, and across said railroad, over, along and upon which said street railroad, electric cars for the conveyance of passengers and conveying large numbers of passengers, were run and propelled daily at intervals of fifteen minutes apart; that on the line of said railway in the village

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of Berwyn, there were then and there, and for a long time prior thereto, maintained two depot stations, the most easterly of which was then and there called, Berwyn, and the most westerly was then and there called Harlem Avenue station, the latter of which was situated at, and immediately north of said Harlem avenue crossing, that many of the inhabitants and residents in that section of the villages of Berwyn and Riverside lying north of said railroad, were then and before that time employed in the city of Chicago, and suburbs lying between Chicago aforesaid, and said Berwyn station, and said inhabitants so being employed, had occasion on the day aforesaid, and for many years prior thereto, daily, to be transported and carried on the trains and cars operated on said railroad, to and from Chicago, aforesaid, from the said Harlem avenue station; that between the hours of six and ten o'clock in the morning of the day aforesaid, and on every day in the year for many years prior thereto, large numbers of people on foot, on horseback and in vehicles, had occasion to pass over, and did pass over said railroads, and the tracks thereof on the 41½ line of said Harlem avenue, in going to and from work, and to and from their places of business, all of which conditions were then and there well known to the said defendants, and to each of them.

Plaintiff further avers that on the date aforesaid, and for a long time prior thereto, said railroad was being run and operated by the defendant, the Chicago, Burlington & Quincy Railway Company, that in the use, management and operation of said railroad, the defendant, the Chicago, Burlington & Quincy Railway Company, caused a very large number of passenger and freight trains to be run over, along and upon said railway, and over and across said Harlem Avenue, to-wit one hundred fifty passenger trains daily, and one hundred fifty freight trains daily.

And plaintiff further avers that good railroading and a proper regard for the lives and limbs of the inhabitants of the said villages of Berwyn and Riverside, and the public generally, on the date aforesaid, and for many years prior thereto, required the defendant, the Chicago, Burlington & Quincy Railway Company, should employ a watchman or maintain gates or other adequate means to warn and protect the traveling public, using said Harlem avenue, crossing, from the danger to life and limbs due to the frequent running of locomotive engines and trains over and across said Harlem avenue cross-

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ing; Yet the said defendant, the Chicago, Burlington & Quincy Railway Company wholly regardless of its duty in the premises, carelessly and negligently caused a locomotive engine with train of cars then attached thereto, then and there being used and operated by the said Chicago, Burlington & Quincy Railway Company, over, along, and upon said railroad, and over and across said Harlem avenue, where said railroad then crossed the same, to be run and operated at a high and dangerous rate of speed, to-wit, at the speed of sixty miles per hour; said locomotive engine and train of cars being then and there run and operated at said high and dangerous rate of speed, over and across said Harlem avenue crossing, at a time when said locomotive engine and train of cars, would, if running upon the time advertised and scheduled
42 by the said Chicago, Burlington & Quincy Railway Company, have been at a point many miles off, to-wit, ten miles east of said Harlem avenue crossing and at a time when said Chicago, Burlington & Quincy Railway Company, had caused a certain other train, consisting of a locomotive engine and cars then and there being run and operated by it, on said railroad, to be stopped and to be at a standstill, at said Harlem avenue station, and adjoining said crossing, for the purpose of receiving and discharging passengers, and in so doing, said defendant, the Chicago, Burlington & Quincy Railway Company failed and neglected to employ a flagman, use gates or other means for the protection of the traveling public, then and there using said crossing, by means whereof, while plaintiff's said intestate, who then and before that time, resided and lived in Riverside, aforesaid, on the north said of said railroad track, was in the act of crossing said railroad track on the line of said Harlem avenue, for the purpose of becoming a passenger on the train then stopped at said Harlem avenue station, as aforesaid, in the exercise of ordinary care and caution for his own safety, said locomotive engines and train of cars first above mentioned, so ran and operated by the defendant, the Chicago, Burlington & Quincy Railway Company, at a high and dangerous rate of speed, as aforesaid, was run over and against the body and person of plaintiff's said intestate, then and there and thereby inflicting upon said intestate such injuries, as then and there caused his death.

And plaintiff avers that the said Harold R. Wellman left him surviving, Victoria Wellman, his widow, and Willard

Wellman, his son and next of kin, are still living, and that by reason of the death of the said Harold R. Wellman, as aforesaid, the said widow and said son have been and are deprived of their means of support, and said Willard Wellman has been and is deprived of his means of support and education and have suffered pecuniary injury and loss.

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And plaintiff brings into court here, the letters of administration to him granted by the probate court of the county of Cook, aforesaid, which give sufficient evidence to the
43 court here of the granting of administration to said plaintiff, etc.

9. And whereas also, heretofore, to-wit, on the third day of January A. D. 1906, and for a long time prior thereto, the defendant, the Chicago, Burlington & Quincy Railroad Company was the owner of a certain railroad extending from the city of Chicago, in the county of Cook, State of Illinois, westerly to and beyond the city of Aurora, in the county of Kane and State of Illinois, that said railroad on the date last aforesaid, was, and for many years prior thereto had been run and operated by the said Chicago, Burlington & Quincy Railway Company, for the conveyance of passengers and goods for reward, that the said railroad on the date last aforesaid, and for many years before that time, passed through the villages of Berwyn and Riverside, to-wit, in the county of Kane, aforesaid, that the territory lying within the corporate limits of said village of Berwyn was then and now is contiguous to the territory lying within the corporate limits of said village of Riverside, the westerly limits of said Berwyn being the easterly limits of said Riverside; that a public highway, commonly called Harlem avenue, running in a northerly and southerly direction, the center line of which then constituted the westerly boundary line of said Berwyn, and the easterly boundary of said Riverside, was intersected and crossed by said railroad almost at right angles, that said railroad at the time and place aforesaid, and for a long time prior to the date last aforesaid, and for many miles to the east and to the west of said Harlem avenue, consisted of three main tracks running parallel to each other, and in close proximity to each other, to-wit, within six feet of each other; that the villages of Berwyn and Riverside, on the date aforesaid, and for several years before that time each had a population of approximately three thousand inhabitants that about one half of the population in each of said villages then resided on the

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northerly side of said railway, and the other half on the southerly side thereof; that a large percentage of the adult
44 male inhabitants of the said villages of Berwyn and Riverside, to-wit, twenty five per cent. thereof, for many years prior thereto, and on the date last aforesaid, were employed in the city of Chicago, aforesaid, or in the suburbs lying between Chicago aforesaid, and Berwyn aforesaid, on the line of said railroad, the greater number of whom were daily conveyed to and from their work on cars and trains ran and operated over, along, and upon said railroad; that on the date last aforesaid, and for a long time before that time, all of the depot buildings and platforms in the said villages of Berwyn and Riverside, used for receiving and discharging passengers, were located on the south side of the tracks and roadbed of said railroad, one of said depot buildings being then and there, and for a long time prior thereto, situated immediately north of and adjoining the highway known as Harlem avenue, aforesaid, and from which a large number of the passengers of said railroad daily took passage on trains being operated thereon, one half of whom were required to pass over and across the three railroad tracks of said railroad to do so that on the line of said railroad between the depot station known as Berwyn in the said village of Berwyn and the Riverside station in the said village of Riverside a distance of approximately two miles to-wit on the date last aforesaid and for many years prior thereto few crossings were provided and maintained across said railroad, for the accommodation of the inhabitants of said villages and the public generally, to-wit, the number of four only, that a surface street railway, many years before said date, and then had been constructed and maintained across, and was then being operated across said Harlem avenue, at grade with said railroad, upon and along which said street railway and across said railroad tracks, then and for a long time before that time, electric cars were run and operated, every fifteen minutes between the hours of six o'clock in the morning and eleven o'clock in the afternoon, in which said electric cars, were carried and conveyed, large numbers of passengers that said Harlem avenue was then, and for many years prior
45 to the date last aforesaid, had been, one of the principal streets intersected and crossed by said railroad in the said villages of Berwyn and Riverside, and was used very

extensively by the inhabitants of said villages and the public generally for highway purposes. Addition to d filed 1906

Plaintiff further avers that on the date aforesaid, and for a long time before that time, the defendant, the Chicago, Burlington & Quincy Railway Company, by and with the consent of the defendant, the Chicago, Burlington & Quincy Railroad Company, ran and operated locomotive engines, cars and trains over, along and upon said railroad and over and across said Harlem avenue, for the conveyance of goods and passengers for reward; that the defendant, the Chicago, Burlington & Quincy Railway Company, then and there caused a large number of freight and passenger trains to pass over, along and upon said railroad and over and across said Harlem avenue, at the point where the same was so intersected and crossed by said railroad, to-wit, the number of one hundred fifty passenger trains daily, and to-wit, the number of one hundred fifty freight trains daily; that between the hours of eight o'clock and ten o'clock in the forenoon on the date last aforesaid, and on every day of the year, for many years before that time, a freight or passenger train ran and operated by the defendant, the Chicago, Burlington & Quincy Railway Company, passed over, along and upon said railroad, and over and across said Harlem avenue, at the point where the same was intersected and touched by said railroad, approximately every five minutes, about one half of which trains were then and there caused to run in an easterly direction, and the other half thereof in a westerly direction; that between the hours of eight o'clock and ten o'clock in the forenoon on the date aforesaid, and for a long period of time thereto, large numbers of people in vehicles, on horseback and on foot going to and from work, and going to and from business and going to and from the depot station at said Harlem avenue, crossed said Harlem avenue on the line of said railroad and railroad tracks, all of which conditions were
46 then and there well known to the said defendants, and to each of them.

Plaintiff further avers that in the management and operation of locomotive engines, cars and trains, along and upon said railroad and over and across said Harlem avenue crossing, with a proper regard for the lives and limbs of the inhabitants of the said villages of Berwyn and Riverside, and the public generally and in an ordinarily careful and prudent manner, it was the duty of the defendant, the Chicago, Burlington & Quincy Railway Company, to so run and operate said

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locomotive engines, cars and trains, and to so guard and protect the traveling public, at said Harlem avenue crossing, as not to expose the inhabitants of said villages and the public generally to unnecessary hazard and danger; Yet the said defendants, the Chicago, Burlington & Quincy Railway Company wholly regardless of its duty in that behalf, then and there carelessly and negligently caused a locomotive engine with train of cars attached thereto to be run and operated, over, along and upon the middle track of said railroad in an easterly direction, towards the city of Chicago, aforesaid, and over and across said Harlem avenue at a high and dangerous rate of speed, to-wit, at the rate of sixty miles per hour, and in so doing, failed and neglected to employ a flagman, use gates or other means for the purpose of warning and protecting such of the public, as were then and there using said Harlem avenue, at the crossing of said railroad therewith, and at a time when the said Chicago, Burlington & Quincy Railway Company, in the management and operation of said railroad and its locomotive engines, cars and trains thereon, had caused a certain other locomotive engine and train of cars attached thereto, to be stopped and to be at a standstill for the purpose of receiving and discharging passengers at Harlem avenue station, aforesaid; by means whereof while plaintiff's intestate was proceeding from his home on the north side of said railroad, towards and across said railroad, along said Harlem avenue, in the exercise of ordinary care and caution for his own safety for the purpose of taking pas-
47 sage on the train then standing at said Harlem avenue station, as aforesaid, said locomotive engine and train of cars first above mentioned, so being run and operated by the said Chicago, Burlington & Quincy Railway Company, over, along and upon the middle track of said railroad, as aforesaid, in an easterly direction, as aforesaid, and over and across said Harlem avenue, as aforesaid, at the high and dangerous rate of speed, aforesaid, hit and struck said intestate with great force and violence, then and there and thereby inflicting upon the body and person of said intestate, such injuries, as then and there caused his death.

And plaintiff further avers that the said Harold R. Wellman, left him surviving, Victoria Wellman, his widow and Willard Wellman, his son and next of kin, who are still living, and that by reason of the death of the said Harold R. Wellman, the said next of kin have been deprived of their means of support, and the said Willard Wellman has been and

is deprived of his means of support and education and have suffered and sustained pecuniary injury and loss.

And plaintiff brings into court here, the letters of administration to him granted by the Probate Court of the County of Cook, aforesaid, which give suffcient evidence to the Court here of the granting of administration to said plaintiff, etc.

Wherefore, the said plaintiff says that he has sustained damage, as administrator, as aforesaid, to the amount of ten thousand dollars, and therefore he brings this suit, etc.

JOHN A. MCKEOWN,
DONAHOE, MCNAUGHTON & MCKEOWN,
attorneys for plaintiff

(Endorsed) Filed Dec. 26, 1906, Marshall E. Sampsell, Clerk.

48 And afterwards to-wit, on the third day of January, 1907, come the defendants in said entitled cause by their attorneys and filed in the clerk's office of said court their certain plea in the words and figures following to-wit: Plea, 1907

PLEA.

State of Illinois, } ss.
County of Cook, }

IN THE CIRCUIT COURT OF THE UNITED STATES,

Northern District of Illinois,

Eastern Division.

December term, A. D. 1906.

Willard, Admr.,
plaintiff,
vs.
Chicago, Burlington & Quincy Railway Company and Chicago, Burlington & Quincy Railroad Company,
defendants,

And the defendants, the Chicago, Burlington and Quincy Railway Company and Chicago, Burlington and Quincy Rail-

Jan. 3, road Company, by Hopkins, Peffers & Hopkins, their attorneys, come and defend the wrong and injury, when, etc, and say that they are not guilty of the said supposed grievances above laid to their charge, or any or either of them in manner and from as the plaintiff has above thereof complained against them; and of this the defendants put thermselves upon the country, etc.

HOPKINS, PEFFERS & HOPKINS,
Attorneys for defendants.

(Endorsed) Filed Jan., 3, 1907, Marshall E. Sampsell, Clerk.

21, 49 And afterwards to-wit, on the twenty-first day of June, 1907, being one of the days of the regular December term of said court, 1906, in the record of proceedings thereof in said entitled cause before the Hon. Francis M. Wright, District Judge, appears the following entry to-wit:

ORDER OF JUNE 21, 1907, CALLED FOR TRIAL AND JURY SWORN.

Erastus W. Willard, Admr, etc.
vs.
Chicago, Burlington and Quincy Railroad Company, *et al.* } 28523

This cause being called for trial now come the parties by their attorneys and come also the following jury to-wit: Frederick P. Knowles, Frank W. Mead, O. H. Ginler, O. S. Marron, L. P. Naramore, George B. Heartt, George N. Jones, Henry Steege, Ed. H. Olson, John Wolf, L. F. Pierce and Warren D. Smith, who were all duly elected, tried and sworn to well and truly try said issue and a true verdict render according to the law and the evidence; and the opening statements of counsel being heard and the evidence in part for the plaintiff when the usual hour for adjournment having arrived, the further trial of this cause is postponed until tomorrow morning.

50 And afterwards to-wit: on the twenty-second day of June, 1907, being one of the days of the regular December term of said Court, 1906, in the record of proceedings thereof in said entitled cause before the Hon. Francis M. Wright, District Judge, appears the following entry to-wit: Trial, 1907.

ORDER OF JUNE 22, 1907,

Erastus W. Willard Admr, etc,
vs.
Chicago, Burlington & Quincy Railroad Company, *et al.* } 28523

Now again come the parties by their attorneys and come also said jury and the trial of this cause is resumed, and the evidence in chief for the plaintiff being now heard and concluded, the defendants enter their motion to have said jury instructed to return a verdict finding each of said defendants not guilty, and the court, having heard arguments upon said motion when the usual hour for adjournment having arrived, the further trial of this cause is postponed until Monday morning next.

51 And afterwards to-wit, on the twenty-fourth day of June, 1907, being one of the days of the regular December term of said court, 1906, in the record of proceedings thereof in said entitled cause before the Hon. Francis M. Wright, District Judge, appears the following entry to-wit: Verdict, 1907.

ORDER OF JUNE 24, 1907, JURY UNDER INSTRUCTIONS OF THE COURT RETURN A VERDICT FINDING DEFENDANTS NOT GUILTY.

Erastus W. Willard, Admr, etc.
vs.
Chicago, Burlington & Quincy Railroad Company, *et al.* } Law 28523

Now again come the parties by their attorneys and come also said jury heretofore duly empaneled, tried and sworn, and now comes on to be further heard the motion of the defendants to have said jury instructed to return a verdict for

24. said defendants, and the court, having heard the arguments of counsel to conclusion and being now fully advised in the premises, sustains said motion and thereupon said jury, under the instructions of the court, return their verdict finding said defendants, Chicago, Burlington & Quincy Railroad Company and Chicago, Burlington & Quincy Railway Company, not guilty, to which ruling of the court the plaintiff then and there duly excepts and enters his motion for a new trial.

w June 52 And on to-wit the twenty-ninth day of June, 1907, there was filed in the clerk's office of said Court a certain Motion in words and figures following to-wit:

MOTION FOR NEW TRIAL.

United States of America,
Northern District of Illinois, } ss.
Eastern Division,

IN THE UNITED STATES CIRCUIT COURT,

In and for the Northern District of Illinois,

Eastern Division.

Erastus W. Willard, Administrator of the Estate of Harold R. Wellman, deceased, *vs.* The Chicago, Burlington & Quincy Railway Company and the Chicago, Burlington & Quincy Railroad Company,	Motion for New Trial.

And now comes the plaintiff, Erastus W. Willard, administrator of the estate of Harold R. Wellman, deceased, by Donahoe, McNaughton & McKeown, his attorneys, and moves the court to set aside the verdict heretofore entered and grant a new trial in the above entitled cause, for the following reasons:

First: The Court erred in refusing to permit the plaintiff to prove on the trial of said cause, the physical condition at

the Harlem avenue crossing of the Chicago, Burlington & Quincy Railroad Company. Motion trial 29,

Second: The Court erred in refusing to permit the plaintiff to prove the number of highway crossings open for use in the Village of Berwyn.

53 Third: The Court erred in refusing to permit the plaintiff to prove that within a distance of three-quarters of a mile between Harlem Avenue Station on the line of the Chicago, Burlington & Quincy Railroad Company, the defendants maintained but one crossing.

Fourth: The Court erred in refusing to permit the plaintiff to prove to what extent Harlem Avenue, at the point where the same is intersected by the railroad of defendants, was used by the public.

Fifth: The Court erred in refusing to permit the plaintiff to prove to what extent the railroad Company used its right of way and tracks where the same intersected Harlem Avenue.

Sixth: The Court erred in refusing to permit the plaintiff to submit to the jury, other evidence, material and competent to be considered by it in the determination of the questions of fact at issue.

Seventh: The Court erred in sustaining the motion to exclude the evidence from the jury at the close of plaintiff's case.

Eighth: The Court erred in directing the jury to find for the defendants.

Ninth: The Court erred in holding, as a matter of law, that deceased, Harold R. Wellman, in attempting to cross the right of way and tracks of the defendants on the third day of January, 1906, was guilty of contributory negligence.

Tenth: The Court erred in instructing the jury to find for the defendants.

Eleventh: The verdict is contrary to the law.

Twelfth: The verdict is contrary to the evidence.

Thirteenth: And for other reasons.

DONAHOE, MCNAUGHTON & MCKEOWN,
Plaintiff's Attorneys.

(Endorsed) Filed June 29, 1907, H. S. Stoddard, Clerk.

July 9, 54 And afterwards to-wit: on the ninth day of July, being one of the days of the regular July term of said Court, 1907, in the record of proceedings thereof, in said entitled cause before the Hon. Francis M. Wright, District Judge, appears the following entry to-wit:

JUDGMENT OF JULY 9, 1907.

Erastus W. Willard, Administrator of the estate of Harold R. Wellman,
vs.
Chicago, Burlington and Quincy Railroad Company and Chicago, Burlington and Quincy Railway Company. } 28,523

Now again come the parties by their attorneys and now comes on to be heard the motion of the plaintiff for a new trial and the court, having heard the arguments of counsel to conclusion and being now fully advised in the premises, overrules and denies said motion, to which ruling the plaintiff excepts.

It is thereupon considered and adjudged by the court that the plaintiff take nothing by his said declaration and that the said defendants as to the allegations contained and alleged in said declaration be and they are hereby forever discharged and go hence without day; and that they recover of the plaintiff their costs herein to be taxed and that execution issue therefor.

And thereupon the plaintiff entering his motion for a writ of error to the United States Circuit Court of Appeals for this circuit, sixty days are allowed the plaintiff to prepare and present his bill of exceptions.

55 And on to-wit, the fourth day of September, 1907, come the plaintiff in said entitled cause by his attorneys and filed in the clerk's office of said Court, a certain Bill of Exceptions in words and figures following to-wit.

56 BILL OF EXCEPTIONS. Bill o file 190

United States of America
Northern District of Illinois } ss.

IN THE CIRCUIT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division.

..... Term, A. D. 1907.

Erastus W. Willard, Administrator of the Estate of Harold R. Wellman, deceased,
Plaintiff,
vs.
Chicago, Burlington & Quincy Railroad Company, and Chicago, Burlington & Quincy Railway Company,
Defendants.

Bill of Exceptions

Be it remembered that heretofore, to wit, on the 21st day of June, A. D. 1907, being one of the days of said ..... term, A. D. 1907, of said court, before his Honor Francis M. Wright, one of the judges of said court, sitting on the common law side thereof, and a jury, this cause came on for trial upon the pleadings heretofore filed herein.

Mr. Coll McNaughton appearing on behalf of the plaintiff; Messrs. Hopkins, Peffers & Hopkins appearing on behalf of the defendant.

And thereupon the plaintiff, to maintain the issues on his part, introduced the following evidence, to wit:

57 DWIGHT L. KAMMERER, called as a witness on behalf of the plaintiff, being first duly sworn, was examined in chief by Mr. McNaughton, and testified as follows: Testim Dwig Kam

Q What is your full name?
A Dwight L. Kammerer.

Q Where do you reside, Mr. Kammerer?
A Riverside, Illinois.
Q How long have you lived at Riverside?
A Something over twenty years.
Q Are you familiar with the tracks of the Chicago, Burlington & Quincy Railroad Company through Riverside and Berwyn?
A Yes, sir.
Q Do you know what street constitutes the eastern limits of Riverside?
A Yes, sir.
Q What is the name of the street?
A Harlem avenue.
Q Do you know what street constitutes the western limits of Berwyn?
A Yes, sir.
Q What is the name of the street?
A Harlem avenue.
Q So that the eastern limit of Riverside is the western limit of Berwyn?
A Yes, sir.
Q The two corporations are adjoining each other?
A Yes, sir.
Q What is the next suburb, village or city east of Berwyn?
A La Verne.
Q And the next east of that?
A Clyde.
58 Q Do you know where Hawthorn is?
A Yes, sir.
Q Can you state the exact distance between Harlem avenue station and Hawthorn?
A About four miles.
Q And the distance between Riverside station and Harlem avenue?
A It is very near a mile, exactly.
Q And the distance between Harlem avenue and Berwyn station, next east?
A About six blocks.
Q How do the tracks of the Burlington run through the villages of Riverside and Berwyn?
A Almost east and west; a little bit to the south.
Q How many main tracks are there?
A Three.

Q Do you know the manner in which those tracks were used by the operating road on the third day of January, 1906, and before that time?

Mr Peffers: That is objected to for the reason that it is immaterial how it was operated.

Mr McNaughton: The purpose of the question, your Honor, is to ascertain which was the east bound and which was the west bound. I could ask the question in that form—

The Court: Well, he may state that, if that is the object.

A The north track is exclusive for west bound trains, and the south track is used exclusively for east bound trains, and I guess the middle track, at different times in the day, is used for both west and east bound trains.

Q Do you know when the middle track is used as an east bound track?

59 A In the morning I know it is; I am not familiar with the hours.

Q You don't know how late in the morning it is used?

A No, sir.

And that was the situation on January 3rd, 1906, and before that time?

A I think so.

Q Does Harlem avenue constitute the chief highway between any two or more villages?

A Yes, sir.

Mr Peffers: I do not see the materiality of that, your Honor.

The Court: There is no dispute about that, is there?

Mr Peffers: Not that it is a public highway; that is about all.

Mr McNaughton: This is for the purpose of showing the extent to which it was used by the public.

The Court: Oh, well, he had the right to use the public highway as a highway. There is no question about that.

Mr. McNaughton: Our position is that it becomes the duty of the railroad to exercise a higher decree of care at a public highway that is used very extensively than at a highway that is used very little.

The Court: I don't think that question is involved here. It is the kind of care that they used on this particular occasion, so far as the rights of the deceased are concerned. It is misleading. It is assuming that they were under some

obligations to use a greater degree of care of this person on account of other people.

60 The Court: I don't see how that can obtain. It is a public highway, and of course he can state how much it was used, if that is the question.

Mr McNaughton: State whether or not a surface street railway was operated in Riverside.

Mr Peffers: That is objected to, too.

The Court: That is descriptive.

Mr. Peffers: Well, if it is only for the description—

The Court: Description of the location there. He may state that.

A Yes, there was a street railway there.

A Juror: A little louder.

Mr McNaughton: Some of the jurors don't hear you.

A Yes, there was a street railway there; there was at that time and there is now.

Q Is there any other street railway in the villages of Riverside and Berwyn, intersecting the Burlington?

Mr Peffers: That is objected to.

The Court: Unless it was at this crossing it is immaterial.

Mr McNaughton: Do you know with what frequency the street cars ran over the Burlington on the line of Harlem avenue on January 3rd, 1906, and prior to that time?

Mr Peffers: That is objected to.

The Court: I cannot see its materiality.

Mr Peffers: He was not on the street car.

61 The Court: I say I can't see its materiality.

Mr McNaughton: Did you say he was not on the street car?

Mr Peffers: No, there is no question of a street car involved in this case, if the court will permit me to suggest it.

The Court: You can show it was a public highway. The frequency with which it was used is wholly immaterial. Let us get down to this accident. That is all that is material.

Mr McNaughton: Do you recall anything happening at the crossing at Harlem avenue on January 3rd, 1906?

A Yes, this accident occurred at that time.

Q Where were you just prior to the accident?

A I was on the street car—forward end, right by the front window of the car.

Q Which way was the street car going?

A It was east bound—well, it was not bound there, as the car stood; it was an east bound car.

Q But at that point the car was proceeding north?
A Yes.
Q Now, so that there will be no confusion, why do you say that was an east bound car?
A Well, it was bound for down town.
Q Did it turn off Harlem avenue at some point?
A On Harlem avenue the cars run north and south.
Q What?
A On Harlem avenue the cars run north and south.
Q. Where does it run?
62 A The car was right at the railroad crossing, facing north.
Q Where does the car turn to go east and west?
A About 20 feet beyond the Burlington tracks.
Q And then it runs parallel with the Burlington tracks.
A Yes.
Q Do you know the name of the conductor of that car?
A Yes.
Q What was his name?
A Mr. Sullivan.
Q Do you know the name of the motorman?
A I do not.
Q Were you a passenger on the car?
A I was.
Q Was there any other passenger on the car?
A Yes.
Q Do you know the name of any other passenger?
A I do not.
Q Do you now recall that this happened on the 3rd of January?
A Well, I couldn't say positively as to the date; I know it was along about that time.
Q When you got to the railroad right of way what was the first thing you observed?
A Well, the car stopped—the car always stopped there—and the conductor got off and run ahead of the car to see if the crossing was clear. This dummy came in and stopped at the depot, and I happened to observe Mr. Wellman coming up the—I should say about 20 feet from the crossing on the north track.
Q The first thing you noticed then was what you call the dummy?
A Yes, sir.

63 Q That was the local?

A That was the local train, yes.

Q Do you know exactly when that local was due at the Harlem avenue station?

Mr Peffers: That is objected to.

A Well, it is supposed to be due about 8:40.

Mr McNaughton: This is for the purpose of fixing the time only, your Honor, that is all. Just talk as loud as you can, Mr. Kammerer, so the jurors can hear.

A All right.

Q What was the position of the local or dummy just as it got to the highway, as to whether or not it was going across Harlem avenue or south of it or north of it?

A Well, it stopped east of the crossing, right at the station there.

Q Yes,—well, but I asked you what was the position of the local just as you came to a standstill at the right of way. Was it then east of the crossing?

A I think that the car, as I remember, stopped, and the dummy went by after the car had stopped there, and stopped at the station.

Q Now, after the dummy went by state whether or not it stopped at the Harlem avenue station?

A It did.

Q Now, the Harlem avenue station is east of the Harlem avenue crossing?

A Yes, sir.

Q Do you know the exact distance?

A I could not exactly; I should say it would be something over 100 feet.

Q Did the local train clear the entire street?

64 A Yes, sir.

A Now, at that time state whether or not you saw Mr. Wellman.

A I saw Mr. Wellman. Evidently he was running for this train. I merely glanced out of the window—

Mr Peffers: Simply state what he was doing.

The Court: Of course that is a mere conclusion. Describe what he was doing.

A He was running for the train.

Mr Peffers: Well, now, I move to strike that out. Just simply say what he was doing.

The Court: That is the same answer that he gave before,

and I said before it was only a conclusion of the witness. The witness has been admonished to state what he knew. Of course if he knew he was running for the train that is his responsibility.

Mr McNaughton: In what direction was Mr. Wellman running?

A He was running east.

Q When you first observed him state how far he was from the Harlem avenue crossing—giving his position as best you can.

A I should say 15 or 20 feet.

Q What is that?

A I should say fifteen or twenty feet; that is west of the crossing.

Q West of the crossing?

A Yes.

Q Now, with reference to the right of way of the railroad company where was he then, when he was fifteen or
65 twenty feet west of the crossing on the right of way?

A That I could not say positively. There is a beaten path right close by the side. I could not say positively whether he was on this path or on the track, as he was right close to the crossing.

Q Did you see Mr. Wellman struck by the train?

A I did not.

Q Did you see a train pull towards the—going east—

A I did.

Q —about that time?

A I did.

Q On what track did that train that you now speak of run?

A On the middle track.

Q Was it running fast or slow?

A It was going at a pretty good rate of speed.

Q Had you had experience riding on railroad trains?

A I have.

Q What is your estimate of the speed at which that train was moving at the time that you arrived at the Harlem avenue crossing?

Mr Peffers: That is objected to, I don't see that it makes any difference.

The Court: What is that?

Mr Peffers: I object to that. I don't believe the speed makes any difference.

The Court: Well, it may not, but it is descriptive of
66 what occurred there. It may not be material, but let him tell.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

A I should say it was going about fifty miles an hour.

A Juror: A little louder, please.

A I should say it was going fifty miles an hour.

Mr McNaughton: Do you know whether or not the bell on the engine drawing the train east bound on the middle track at that time was ringing as it approached the Harlem avenue crossing?

A I didn't hear it.

Mr Peffers: I want to preserve an objection to that question.

The Court: It comes within the same category. It is descriptive of what happened there. It will be determined later on whether it is material or not. He may answer.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

Mr McNaughton: What is the answer?

A It may have been ringing, but I did not hear it.

Q State whether or not the whistle was blown?

A I didn't hear any whistle blown.

Mr Peffers: I want to preserve the same objection to that and exception that I did to the other question.

The Court: What did you say?

Mr Peffers: I want to preserve the same objection and exception to that I did to the other question.

67 The Court: Very well, you may have it.

Mr McNaughton: How was the weather that morning at that time?

A Very bad morning, foggy and rainy.

Mr Peffers: I object to that.

The Court: That is also descriptive; he may answer.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

Mr McNaughton: Describe to the jury, in your own way, what you mean by your former answer?

A Well, it was very foggy, rainy, wet morning. I remember distinctly the weather was very bad. I had to walk probably pretty near a mile up to this car. I remember that

I carried an umbrella, and it was blowing and it was a very bad morning.

Q How was the wind blowing, in what direction?

A The wind was blowing from the east or almost so, I should say; as near as I can remember, it was blowing from the east.

Q You remember whether or not the smoke was emitting from the smoke stack of the local as it stood at the Harlem avenue station?

A I remember that it was.

Q How was the smoke blowing?

A Well, the atmosphere was very heavy and the smoke blew along close to the ground. It blew around the car, I remember very distinctly, the steam and smoke.

Q Down the track?

A Yes.

Q Towards the west?

A Yes.

68 Q Did you say that of the steam also?

A Yes, sir.

Q You remember whether or not the bell on the local was ringing?

A I think it was.

Q As you made these observations to which you have testified where were you situated?

A On the front end of the car, street car.

Q Were you on the inside of the car or outside?

A Inside.

Q Inside?

A Yes, sir.

Q How were you faced—in what direction were you looking?

A I was facing west.

Q State whether or not you looked toward the west?

A I did. I was reading a paper and I glanced up and I saw Mr. Wellman heading for the train. I paid no further attention until this fast train flashed by, and I saw Mr. Wellman lying on his back.

Q Where was the fast train when you first observed it?

A The noise it created itself—

Q What is that?

A The noise the train created itself directed my attention to the fact—

Q I asked you where the train was?
A It was flashing by the crossing.
Q Going right over the crossing when you first observed it?
A Yes.

Q Did you at the time that the train went over the
69 crossing know that Mr. Wellman was struck, or did you learn that afterwards?
A I learned that afterwards.
Q Did you see where the body was after it was struck?
A I did.
Q Where was it?
A It was quite a little distance east of the crossing, almost at the end of the local train which had stopped. It laid between the two tracks.
Q Which track do you refer to in your answer?
A Between the south and the middle track.
Q How is that?
A Between the south and the middle track.
Q Do you know whether or not the air brakes were applied to the express going east on the middle track?
A I do not.
Q Do you know whether or not the express stopped?
A It did.
Q Do you know where it stopped?
A Well, the engine was very close to the Berwyn depot.
Q Did it back up again?
A That I couldn't say. I know they put the body on the local train.
Q And took the body east?
A Yes.
Q What would you say in blocks would be the distance between Harlem avenue and the point where the engine stopped?
A Four or five blocks.
Q Did you continue a passenger on the street car?
A Yes, sir.
Q Or did you take the local?
A I staid on the car.

70 The Court: Is there anything else?

Mr McNaughton: I think, your Honor, that is all I can think of now. I may have overlooked something in the direct examination.

Cross-Examination by Mr. Peffers.

Q Mr. Kammerer, where do you reside?
A Riverside.
Q What is your business?
A Bookkeeper.
Q Where do you work?
A I am not employed just at present.
Q Where did you work on January 3rd, 1906?
A Western Electric.
Q Western Electric?
A Yes.
Q You were employed in the same place—
A No, I wasn't at that time, no, either. I was with the Western Sign Manufacturing Company at that time.
Q Did you know Mr. Wellman during his lifetime?
A Only by sight.
Q You never had any speaking acquaintance with him?
A No, sir.
Q Now, where did you live in Riverside, on the north side of the track or on the south side of the track?
A Laughton road on the south side of the track.
Q South side of the track?
A Yes.
71 Q You boarded this car that morning on the south side?
A About the first street that runs through Riverside south of the Burlington tracks.
Q And you rode around up to Harlem avenue?
A That is just about a block and a half from Harlem avenue.
Q I understand, I am thoroughly familiar with it. You came up that morning to the Burlington Railroad, didn't you, in a car?
A I got on at Laughton road on the car and rode up to the Burlington tracks about a block and a half.
Q In the car?
A Yes.
Q You were inside of the car?
A I was on the inside of the car.
Q On a seat?
A On a seat.
Q You were not on the vestibule, you were on a seat?
A The first seat inside of the door.

Q Did the seats run with the car, or diagonally to the sides of the car?

A Side seats.

Q You were reading your paper?

A Yes.

Q And you came up there—what time in the morning was that?

A About 8:40.

Q About 8:40?

A Yes.

Q And how far did the car stop from the Burlington track? How far was it from the south rail of the south track?

A Very close; I should say probably about fifteen feet.

Q Probably fifteen feet?

A Yes.

72 Q The front end of the car was about fifteen feet from the south rail?

A Well, they ran pretty close to the crossing.

Q I am not tying you down to a foot or two, but how many feet would you say?

A I should say 15 feet.

Q That is, the head end of the car was about 15 feet from the south rail?

A Yes.

Q And you sat there reading your paper?

A I did.

Q And bye and bye the local came along, did it?

A Yes.

Q Well, how long had the car been there before the local pulled in?

A Why, just an instant. It stopped to let the local pass.

Q And the local ran down and stopped at the Harlem avenue station?

A It did.

Q Now, you are thoroughly familiar, are you—I think you testified about the streets and location of Harlem avenue and Riverside and all those tracks there, didn't you?

A Yes.

Q Now, I want to show you an exhibit here. Mark this Defendant's Exhibit 1 for identification.

Said photograph was then marked Defendant's Exhibit 1 for identification.

Q Mr. Kammerer, I will show you defendant's exhibit 1

for identification and ask you what that photograph represents if you recognize it?

Mr McNaughton: I desire to interpose an objection
73 on the ground that this is not germane to the direct examination.

Mr. Peffers: He testified he is thoroughly familiar with it. and I want to ask him some questions about what he has testified

The Court: He has testified about the tracks there. I think his attention may be called to the diagram or photographs.

Mr Peffers: He testified as to distances.

A I couldn't say positively as regards the distances.

Mr McNaughton: I don't know what these photographs are.

Mr Peffers. Wait until he gets through and I will show it to you.

The Court: Here are some he showed me. He says they are the same.

Mr Peffers: What does that represent?

A Harlem avenue crossing.

Q What is this building?

A Harlem avenue station.

Q Harlem avenue station of the Burlington?

A Yes.

Q And that is the station you referred to in your testimony?

A Yes.

Q Now, Mr. Kammerer, what is the distance between that crossing there where the street car track crosses Harlem avenue and the station?

A I couldn't say; I should say something over one hundred feet.

Q About one hundred feet?

A Yes.

Q That shows the lay of the track, does it not?

A Yes, sir.

74 Q And the way the street car tracks come across?

A Yes, sir.

Q Now, how far did the engine on the local pull down that morning?

A Right opposite the depot.

Q Did the engine stand right opposite the depot?

A I couldn't say positively. The train pulled by. I believe there were about two cars in the train. It pulled quite a distance beyond the crossing.

Q The train pulled quite a crossing beyond Harlem avenue?

A The train was clear of the crossing.

Q How far did it clear it?

A That I couldn't say positively.

Q Did you pay any attention to it?

A I saw the train standing there, yes.

Q About how many feet was the rear end of the local, the 8:40 train from Harlem avenue?

A. Well, I should say it was the entire distance, as I said before, to the depot.

Q One hundred feet?

A I should say—

Q The rear end of the train was about the front of the station?

A Well, yes.

Q Well, that would be about 75 to 100 feet, wouldn't it?

A Yes.

Q That is the rear end of the train?

A Yes, the rear end of the train.

Q It was a two-car train?

A I believe so.

Q Then the locomotive on the 8:40 train, the dummy train or local, as we have called it here, was some little distance east of the Harlem avenue station?

A I couldn't say positively, but I believe it was.

Q Now, look here, you have stated that the rear end of this two-car train was about at Harlem avenue station?

Mr McNaughton: I object to that form of examination. He has no right to say in the presence of the jury that the witness has said so and so.

The Court: He may ask him what he did say.

Mr. Peffers: Didn't you say, Mr. Witness, that the rear end of the dummy was about at this station?

A I said that, yes, sir, and I think it was, as near as I can recall it.

Q That would bring it about 75 to 100 feet, wouldn't it, from Harlem avenue?

A Yes.

Q You say there were two cars on that train, weren't there?

A I think so, as far as I can remember.

Q Now, the engine was on the rear end of the train, wasn't it?

A I presume the engine was a little beyond the depot.

Q Wasn't it some considerable distance beyond?

A It may have been; I couldn't say positively.

Q You saw the local standing there?

A Yes, sir.

Q Have you any idea how long those cars are?

A About ninety feet.

Q And there were two of them?

A Yes.

Q The rear end of the last one was about at the station?

76 A As near as I can recollect, I think so.

Q You would have a part of the rear car and then 90 feet more and then the length of the engine so that the engine of the dummy was 100 feet or 110 or 115 or 120 feet beyond the station, wouldn't it?

A It would figure out that way.

Q I am asking you whether that was the fact?

A I think the engine was a little beyond the depot.

Q Will you say it was 100 feet?

A I wouldn't say it was one hundred.

Q Ninety feet?

A It may have been.

Q Would you say it was any less than that?

A I couldn't say positively as regards to distances, because I didn't take any special note of it.

Q How far do you guess or estimate, as closely as you know how, how far was that engine east of the Harlem avenue station?

A Probably a car length.

Q Well, that is 90 feet?

A (No answer.)

Q Now, you have said that there was smoke and steam blowing around there.

A There was.

Q Was there such an amount of steam and smoke blowing there that you could not see Mr. Wellman?

A Well, the train pulled in and the smoke and steam blew along the ground around the car. I noticed it distinctly.

Q After the train went by you saw Mr. Wellman, didn't you?

A I did.

Q So that there was not any smoke or fog between you
77 and Mr. Wellman?

A Well, there may have been for an instant.

Q Only for an instant?

A Yes.

Q And it disappeared very quickly, did it?

A It did. You know how steam and smoke will blow; it will blow on the ground and flurries like.

Q Flurried up, and as soon as the back end of the train got down to the station the smoke and steam disappeared about the crossing, didn't it?

A I don't know as it did.

Q Couldn't you see Mr. Wellman perfectly?

A I saw Mr. Wellman—

Q Perfectly?

A Yes.

Q By the way, how wide is the Burlington right of way at that point?

A There are three tracks, I don't know the width of it.

Q I will show you "Exhibit 2", that shows the tracks, and ask you if that represents the tracks.

A I think it does, yes, sir.

Q And this track coming across here is the street car track, and this track, when you look at the photograph at my left hand, that is the east bound main and this is the center track that you testify to was used for both east and west, and this other track, at the right as you look at the photograph is the west bound track, and that correctly represents the situation?

A It does.

78 Q Your car was over here at the edge of this track?

A Yes, sir.

Q Where was Mr. Wellman?

A When I saw Mr. Wellman he must have been down in here somewhere.

Q He was how many feet?

A I should say he was fifteen or twenty feet away from the crossing when I saw him.

Q Inside or outside the track?

A I could not say whether he was inside or outside. I just glanced out and saw him.

Q Now, how far was Mr. Wellman from you at that time?

A On the crossing?

Q About 15 feet; you were 15 feet south of the track, now how far were you away from Mr. Wellman when you could see him first—100 feet?

A It might be that. The width of the tracks and 15 feet.

Q The width of the tracks and 15 feet and your 15 feet would make about 100 feet?

A Yes, sir.

Q You were facing in which direction?

A West.

Q You were not facing north?

A As I said before the car was facing north.

Q Yes.

A I was seated in a side-seated car.

Q As you faced north the seats run—

A North and south.

Q So that threw you facing to the west?

A Yes, sir.

Q How far down the Burlington track could you see that morning on account of this fog?

A It was a very bad morning; I don't think you could see very far.

79 Q How far down did you see?

A I did not make any particular estimate, because I did not take any particular notice.

Q You could see 100 feet?

A I presume I could.

Q You could see 600 or 700 feet, couldn't you?

A Probably you could.

Q Didn't you estimate that morning—it was slightly raining?

A Yes, sir.

Q The reason I know that, I happened to be on that train.

Mr McNaughton: I object to the remark of counsel. I insist that counsel cannot testify in this case.

The Court: He will withdraw it.

Mr. Peffers: Yes, but I did not know that you heard my remark.

Mr McNaughton: I have no cotton in my ears.

Mr Peffers: If you have I invite you to take it out.

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Q Now, at that time could you not see down there 500 or 600 feet without the slightest trouble?

A I don't know that I could because I didn't take any particular notice. I know it was a bad, foggy, raining morning. I know you could see 100 feet easy enough.

Q Did your vision stop at 100 feet, or did it go further?

A It is possible that you could see further.

Q Do you mean to say you could not see those telegraph poles that morning from where you were?

A Very likely I could.

Q I want to get the state of the weather, how foggy it was. That is, a distance of 400 or 500 feet?

80 A I don't know that it is that far.

Q How far could you see?

A I couldn't say.

Q Could you swear you couldn't see more than 100 feet?

A No, I could possibly see more than that.

Q Now, this train pulled in, you say, and after the train got in the smoke and fog cleared off that morning, didn't it?

A I know the smoke blew down along the ground and around the car, but how long it took to clear away I don't know. I know the smoke and steam escaping from the local train it kept coming back.

Q It did not obstruct your view of Mr. Wellman?

A No, I just glanced out of the window and saw him evidently heading for the train.

Q You looked diagonally across there?

A Yes, sir.

Q And the smoke blew around here on the rear of the cars?

A It was blowing along the track and on the ground.

Q Did you see the train going west?

A I didn't see the west bound train.

Q Did you see any west bound train at all?

A No, not that I could recall.

Q. Was there any west-bound train went by while your car stood there?

A There might be; I didn't see it.

Q You didn't see any train?

A Not going west.

Q You saw no train going west on the Burlington tracks at that time while you were on the car?

A No train except—

81 Q Now, as you sat there in that car you saw Mr. Wellman?

A I did.

Q And by that time you saw this train come along?

A I think the local you speak of?

Q No, the fast train. The local had gone down.

A The fast train was there a short interval after the local. The fast train flashed through. I was reading the paper and just glanced out through the window, and I did not know it was Mr. Wellman. I saw a man approaching. He was evidently heading for the train. The first I knew of the fast train was the noise it created as it flashed by.

Q You had absolutely no trouble in seeing that big locomotive as it flashed by on the crossing?

A I didn't see it until it rattled over the crossing.

Q But you had absolutely no trouble in seeing that locomotive—it was a great, big, ponderous affair?

A Yes sir.

Q You had no trouble seeing that engine coming down 15 feet south, and Mr. Wellman was about the same distance away that you were when you saw him?

A I could not say; I did not know the train struck him; I did not see the train strike him. I saw him before it approached the crossing.

Q Almost at that instant the train came along?

A Yes, sir.

Q. It must have, because it caught him right there.

82 As soon as you saw Mr. Wellman you resumed reading your paper?

A Yes, sir.

Q How soon after you saw Mr. Wellman did the train come along?

A Almost instantly.

Q There was not any train, I think you said, after you looked at Mr. Wellman—confine yourself to this specific point—after you looked and saw Mr. Wellman there was no train went by?

A What do you mean?

Q It happened almost instantly?

A It must have, yes, sir.

Q Now, you were reading your paper, and it happened very quickly?

A Yes, sir.

Q It went by in a flash?
A Yes, sir.
Q And it was running 50 or 60 miles an hour?
A As far as I could see it it was running about 50 miles an hour.
Q You testified you were something of an expert in estimating the speed of trains?
A I did nothing of the kind.
Q You don't claim to be an expert on that?
A No, sir.
Q You said you heard no bell?
A Yes, sir.
Q You don't mean to say there was no bell rung?
A No, sir, I said I didn't hear it.
Q I have a memorandum here that you said there was no bell ringing.
A I said I didn't hear any bell nor any whistle.
Q You were reading your paper at that time?
A Yes, sir.
Q How did you happen to notice the bell on the local was ringing?
A I heard that.
83 Q You did not pay any attention to the other?
A I did not. I did not know it was coming until it flashed by.

JOHN E SULLIVAN, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined in chief by Mr. McNaughton, and testified as follows:

Q State your full name?
A John E. Sullivan.
Q Where do you reside?
A 1601 South 40th avenue.
Q How long have you resided there?
A About seven years.
Q What is your occupation?
A I am a street car conductor in the employ of the Chicago Consolidated Traction Company.
Q On January 3rd, 1906, what line were you running on?
A I was running on the line known as the Berwyn and Lyons.

Q Where does that line begin and where does it end?

A It starts at 40th and Ogden and runs west to Lyons. Lyons is the western terminus.

Q In making that run do you pass over Harlem avenue?

A Yes, sir.

Q Is the street line on which you were conductor a surface road?

A Yes, sir.

Q Does it intersect the Burlington on Harlem avenue?

A Yes, sir.

84 Q Is it the only road in Berwyn or Riverside intersecting the Burlington?

A Yes, sir.

Q On January 3rd, 1906, with what frequency did street cars pass over the Burlington crossing on Harlem avenue?

Objected to by counsel for defendant.

The Court: If that is material I fail to discover it.

Mr McNaughton: The idea I have in mind is this: It would not be negligent for a steam railroad to run a steam engine over a public highway where probably one person would not pass once in twenty-four hours, while the running of the same engine over the intersection of State and Madison streets at the same rate of speed would be gross negligence. One might not be negligence at all and the other gross negligence. That is the idea I had in mind in showing the extent and purpose to which this highway was used.

The Court: Well, all that is involved in this case is the due care of the passing of the highway. I cannot see its materiality. It is misleading. The objection is sustained.

To which ruling of the court the plaintiff, by his counself, then and there duly excepted.

Mr McNaughton: Were you conductor on a street car on that line on Harlem avenue on the morning of January 3rd, 1906?

A Yes, sir.

Q Can you state approximately the time that your car arrived at the crossing of the Burlington on Harlem?

85 A Our leaving time from the west end of the line is 8:30 and it requires 12 to 15 minutes to run to Harlem avenue. Get there 8:40 or 8:42, around in there some place.

Q As your car came up to the line of the right-of-way, state whether or not you observed the local of the south track coming in?

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A When I reached that point we came to a stop about fifty feet south of the crossing, and I went ahead to see if the crossing was clear, and the local was just pulling into the station at the time.

Mr Peffers: How many feet did you say?

A I said we generally come to a stop fifty feet south of the crossing.

Mr McNaughton: After the local pulled in what did you do?

A We waited until the local pulled by and I went forward again just to see if the right-of-way was clear, so we could cross over.

Q Did you stop on the right-of-way on the crossing?

A Yes, sir, in the center.

Q At what point did you stop?

A In the center.

Q Near what track of the Burlington?

A The center track.

Q Do you mean now you were in the center of the crossing in the center of the center railroad?

A I mean I was in the center of the railroad crossing.

Q Is the middle track in the center of the railroad?

A Yes, sir.

Q And you were on that middle track?

86 A Yes, sir, on the middle track.

Q Were you on the point of intersection of the street car track and the middle track? Is that where you were situated, while you were making the observation?

A I don't thoroughly understand the question.

Q The steam railroad runs east and west?

A Yes, sir.

Q At that point—and the street car runs north and south there?

A Yes, sir.

Q And they intersect each other at right angles? Now fix, in your mind the point where the street car tracks cross the middle of the track of all the railroad tracks. Can you approximate in the center at that point, formed by those four rails?

A I cannot recall that. I was standing close to the center of the railroad, as I can remember. I don't remember whether I was in the square or not.

Q You cannot just state the exact point?

A No, sir.

Q In what direction were you looking?
A In both directions.
Q To the east and to the west?
A Yes, sir.
Q Do you know the use to which the middle track was put at that hour of day, whether east-bound track or west-bound?
A It is usually east-bound in the morning.
Q Up to what hour?
A I cannot say any certain hour. I have noticed it up to ten o'clock, and probably later. I cannot state the exact hour.
87 Q It is usually used later in the day as a west-bound track?
A Yes, sir, I have seen trains going over it west in the afternoon.
Q And how is the south track used?
A That is generally exclusively an east-bound track.
Q And the north track?
A Generally west bound.
Q On which of these tracks do the through trains run principally, the passenger trains?
A I don't know. I guess they run on all three tracks. Of course the major part go west on the north track, but some of the fast trains go east on the south track and I know fast trains to go east on the center track.
Q How far apart approximately are the tracks on the right-of-way?
A The railroad tracks?
Q Yes, sir.
A Oh, I don't know. I have no idea.
Q How far would you judge the north rail of the south track to be from the south rail of the middle track?
A It might be 20 or 25 feet.
Q You never measured it?
A No, sir.
Q Never looked at it for the purpose of making an estimate, did you?
A No, sir.
Q As you stood near the center of the right-of-way and near the middle track looking west did you observe the fast train coming towards the east?

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A No, not right off I didn't. I could hear one coming.

88 Mr Peffers: What is that?

A I didn't see the train, but I could hear one, and I stood there as it drew near me.

Mr McNaughton: What was the first noise that attracted your attention at any time?

A I listened for the noise and the rumble of the train on the rails, so I could tell if it was approaching.

Mr Peffers: What is that? To hear the rumble of the trains?

A I said I listened to hear the rumble of the train on the rails so I could tell the train approaching.

Q So that you could?

A Yes, sir, I listened for the train.

Mr McNaughton: Did you hear the ringing in the rails?

A Yes sir.

Q Was that the first thing that attracted your attention?

A Yes, sir.

Q Did you afterwards see the locomotive?

Mr Peffers: I object to that.

The Court: He can tell what he saw.

A Yes, sir, I saw the train after it got within a short distance from me.

Mr McNaughton: Did you observe Mr. Wellman about that time?

A Yes, sir.

Q How near to the crossing was Mr. Wellman at the time that you saw the locomotive on the first train on the middle track?

A I should judge he was within about fifteen or twenty feet of the crossing when I first saw the train.

89 Q Do you mean within fifteen or twenty feet of the track where you stood?

A Within fifteen or twenty feet of the crossing.

Q On the middle track?

A Yes sir.

Q As you stood there looking towards the west and listening, did you hear any bell ringing?

A No, sir.

Q On the engine of the train going east on the middle track?

A No, sir.

Q Did you hear any whistle blown?

A No, sir.

Q Were you looking and listening?
A Yes, sir.
Q For the purpose of ascertaining whether a train was coming?
A Yes, sir.
Q Were you listening for the bell?
A I was.
Q And the whistle?
A Yes, sir.
Q And how was your hearing?
A I guess my hearing is good.
Q Is it in any way impaired, Mr. Sullivan?
A Not that I know of.
Q Do you know whether or not at that time the bell on the local was ringing? I ask you if you know, Mr. Sullivan?
A Well, it might have been. I wouldn't be positive. I don't recollect. I think it was though.
Q What is your answer?
A I say I won't be positive. I don't recollect that. It may have been.
Q Did you see Mr. Wellman at the time he was struck?
A Yes, sir.
90 Q How far between the space across the rails of the middle track had he got before he was struck by the engine?
A Why, he was right in the center of the crossing, in between the street car tracks and the steam car tracks, the railroad tracks.
A Juror: I didn't understand that answer.
A I mean to say he was right in the middle of the railroad crossing between the street car track and the railroad tracks where they intersect, right in the center as near as can be.
Mr McNaughton. How far was the body thrown?
A I should judge about 75 feet or so.
Q Where did the body land? On the right-of-way or outside of the right-of-way?
A It landed right at the rear end of the coach of the local that was standing there between the center track and the south track.
Q That is the body was between the center track and the south track?
A Yes, sir, but closer to the south track.
A Near the rear end of the last coach in the local?

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A Yes, sir.

Q What was the condition of the weather at that time?

A Well, it was a bad morning. It was raining, misty and foggy and some snow flurries, if I remember right.

Q How was the wind blowing?

A Direct from the east, off the lake, if I remember.

Q Was it going right down the track towards the west there?

91 A Why, yes. I guess it was.

Q Do you remember whether or not steam and smoke was escaping from the local at Harlem avenue station?

Objected to by counsel for defendant as leading.

The Court: Let him state what he saw.

Mr McNaughton: Well, Mr. Peffers, if I am leading the witness, I beg your pardon. It is the furthest from my intention.

Mr Peffers: Just ask him what the situation was there.

Mr McNaughton: Just go on and describe what you know about the smoke and steam from the local?

A That morning there was considerable rain. It was a bad morning, foggy, and some snow flurries. I don't remember whether there was snow flurries just at that time or not, but I know this train was standing there and there was smoke of the train blowing past off the track.

Q How far to the east did the fast train run after it struck Mr. Wellman?

A It stopped about five blocks off Harlem avenue.

Q Would that bring the engine close to the Berwyn station?

A It is a couple of blocks from the station.

Q Are you able to judge the distance in these five blocks in feet or yards? I ask you if you are able to make a reasonably accurate statement of that distance?

A No, I don't know as I am. It might be 1500 feet or so. More than that.

Q Do you know what was done with the body?

92 A No, sir. After I saw the passengers getting off, taking charge of it, I went on. I didn't stop to see where they were taking the body to.

Q. State whether or not a train passed by on that northbound track as you were there at that crossing?

A I think that a train passed shortly before we arrived there. I would not be positive of that.

Q You have no distinct recollection now of seeing it passing at that time? Testimony of John E. Sullivan.

A I can't recall it. I don't know whether it went before. I am not positive but I thought it passed before we arrived there.

Cross-Examination by Mr. Peffers.

Q Mr. Sullivan, you are employed by the Chicago Union Traction Company?

A No, sir, the Chicago Consolidated Traction Company.

Q How long have you been in their employ?

A Over nine years.

Q On the morning in question you came up there approaching the crossing going south, didn't you, in your car?

A Yes, sir.

Q About how far did your car stop south of the south track? You said about fifty feet.

A. Yes, sir, that is the rule of the company.

93 Q Yes, that is about where you stopped?

A Yes, sir.

Q About fifty feet south of the south track?

A Yes, sir.

Q And then you got out. You can see here what I am asking. (Showing diagram to jury.) I am asking about the center crossing. Now, Mr. Sullivan, you got out of your car and came out into the center?

A Yes, sir.

Q You recognize that as the crossing, don't you?

A Yes, sir, I recognize that as the crossing.

Q You came out there, came across this south track and got to about the center track?

A Yes, sir.

Q You stood on the south rail of the center track?

A We generally walk down this planking, this side.

Q You walked to about the center of the center track?

A Yes, sir.

Q And then the local had gone by by that time?

A It had just pulled in.

Q You walked over to the center track after the local had gone by?

A Yes, sir.

Q Did you stand there, Mr. Sullivan?

A Yes, sir.

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Q You stood there all the time, did you, until the fast train came along?

A Well, I stood there for an instant to ascertain whether it was coming or not.

Q You looked both directions, looked east?

A Yes, sir, it is always customary to look both directions.

Q You looked east and west and see no train coming
94 from the east?

A Not that I recollect. If I had I would not go over.

Q Did you see any train coming from the east at all?

A I don't remember seeing any train.

Q Then you looked towards the west, did you?

A Yes, sir.

Q As I understand you you heard a rumbling on the rails of the center track. Is that it?

A Yes, sir.

Q Did you hear the rumble of the train?

A Yes, sir.

Q That is what attracted your attention?

A Yes, sir.

Q At this time you looked to the west and heard the rumble on the rails and the rumble of the train?

A Yes, sir.

Q On the center track?

A Yes, sir.

Q Where was Mr. Wellman at that time?

A Do you mean to say when I first saw him?

Q Take Mr. Wellman when you first saw him?

A When I first saw Mr. Wellman I should judge he was about 100 feet west of Harlem avenue crossing on the third track.

Q That is this north track?

A Yes, sir.

Q Which way was he going?

A He was going direct east in the west-bound track, that is the north track.

Q Walking or running?

A When I first saw him he lowered his umbrella. He had it open and closed it and then started in a trot direct east in the west-bound track until within 20 feet of the crossing and crossed diagonally across onto the center track where he was struck.

95 Q You had your eyes on him all that time?

A Yes, sir, him and the train.

Q You saw everything he did?
A Yes, sir.
Q Did you see him look back towards the west from which the train was coming?
A I don't think he did.
Q Did he do it?
A I don't think he did. Not that I recollect.
Q Didn't you have your eyes on him all the time?
A Yes, sir.
Q So far as you recollect he never turned around and looked to the west?
A No, only at the time he was struck.
Q As he was running along east on that track and then between the rails and onto the crossing, all this time the train was coming, wasn't it?
A Yes, sir.
Q You could see it?
A Yes, sir, I could see it some distance.
Q Now was there anything to prevent Mr. Wellman from seeing it if he looked around? You could see it?
A The condition of the weather that morning was not very favorable.
Q But you could see that train, couldn't you?
A I could when it was within a certain distance of me.
Q All this time that Mr. Wellman was running along that track the train was coming and you saw it, is not that so?
A I did not say that I saw the train at the same time
96 that I saw Mr. Wellman.
Q How soon after you first noticed Mr. Wellman did you see the train?
A When I first noticed the train Mr. Wellman was about 15 or 20 feet from the crossing. That was my first statement in regard to seeing Mr. Wellman and the train. I first saw Mr. Wellman long before I saw the train.
Q Mr. Wellman ran down the west-bound track towards Harlem avenue?
A Yes, sir.
Q And while he did that the train hove in sight?
A Yes, sir.
Q While Mr. Wellman was running down the track and you were standing on the crossing the train hove in sight? That is about what you want to say?
A I guess that is about right.

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Q How far down the track did you see the engine?
A I do not think it could have been over 200 feet.
Q There was nothing to prevent Mr. Wellman from seeing it had he turned around when he was 15 feet from Harlem crossing, was there? If he turned around when 15 feet away he could see it, couldn't he?
A I presume he could if he was turned around looking directly at it.
Q If he looked around he could see it? You said he didn't but if he had he could?
A He looked around after I shouted the word of warning to him.
Q But then it was too late?
A Yes, sir.
Q You say you could see 250 feet down the track?
97 A 200 or 250.
Q You made a statement that that train stopped five blocks east of Harlem, how do you know that?
A It was still standing there when I passed with our car.
Q Then you could see a distance of 1500 feet to the east but only 250 the other way?
A No, you don't understand it. Our car parallels the Q. We run directly east alongside of the Burlington on Stanley avenue, and this train was standing there.
Q When you went down with your car?
A Yes, sir.
Q All you want to say is that you could see 200 to 250 feet in either direction from Harlem crossing?
A Yes, sir.

Re-direct Examination by Mr. McNaughton.

Q How fast in your judgment was the express on the middle track going when it passed over the Harlem avenue crossing that morning?
A I should judge 45 to 50 miles an hour.
Q To what extent is Harlem avenue at the intersection with the Burlington road, used for pedestrians, people driving in vehicles and people in the street cars?
Objected to by counsel for defendant.
98 The Court: This is a public crossing. They all have the right to use it. The railroad has a right to use it.

I do not know as it makes much difference. Objection sustained.

To which ruling of the court, the plaintiff, by his counsel, then and there duly excepted.

Adjourned to Saturday, June 22nd, 1907, at 10 o'clock A. M.

99 Saturday, June 22nd, 1907.

Court met pursuant to adjournment at 10 o'clock A. M.

Mr. McNaughton: I observe this morning that all my witnesses are not here. Will your Honor indicate how long we are likely to run?

The Court: Half past twelve or one o'clock, and then we will adjourn until Monday.

WILLIAM M. MOTTER, called as a witness on behalf of the plaintiff, being first duly sworn, was examined in chief by Mr. McNaughton, and testified as follows: Testimo Willia Motte

Q What is your full name?
A William M. Motter.
Q Where do you reside, Mr. Motter?
A Riverside.
Q Where did you reside in January of 1906?
A In Riverside.
Q How long have you resided continuously at Riverside?
A Four years.
Q Do you know the location of the right of way of the Chicago, Burlington & Quincy Railroad through Riverside and Berwyn approximately?
A Yes, sir.
Q How does it divide those villages?
A About in the center.
100 Q Do the villages of Riverside and Berwyn adjoin each other?
A Yes, sir.
Q What street, if any, is the east city limits of the one and west city limits of the other?
A Harlem avenue.
Q How many main tracks on the Burlington through Riverside and Berwyn?
A Three.

Q What proportion as to population would you say the Burlington Road divides Berwyn?

Objected to by counsel for defendant as immaterial; objection sustained; to which ruling of the Court the plaintiff by his counsel then and there duly excepted.

Q Approximately what was the population of Berwyn on the 3rd of January, 1906, and prior to that time?

Objected to by counsel for defendant as immaterial; objection sustained by the Court. To which ruling of the Court the plaintiff by his counsel then and there duly excepted.

Q Approximately what was the population of Riverside on and prior to January 3rd, 1906?

Objected to by counsel for defendant as immaterial, objection sustained; to which ruling of the Court the plaintiff by his counsel then and there duly excepted.

Q What is the distance on the line of the Burlington 101 Road between Riverside and the Harlem avenue station?

A About one mile.

Q And what is the distance between Harlem avenue station and Berwyn station along the line of the Burlington?

A About three-quarters of a mile.

Q How many crossings are there across the Burlington Road between Harlem avenue and Berwyn station?

Objected to by counsel for defendant as immaterial; objection sustained; to which ruling of the Court the plaintiff by his counsel then and there duly excepted.

Q Did you know Walter Wellman in his lifetime?

A Yes, sir.

Q How long had you known Mr. Wellman?

A About two years.

Q What is your business?

A Electrical engineer.

Q Were you employed at the same place Mr. Wellman was employed?

A Yes, sir.

Q Did you first become acquainted with Mr. Wellman when he became employed by the firm that had employed you prior to that time?

A Yes, sir.

Q What was his profession?

A Electrical engineer.

Q What class of work did you do chiefly?

A Development work, designing dynamos and motors.

Q Talk as loud as you can, so the furthest juror can hear you.

A It was designing work; designing dynamos and
102 motors and electrical apparatus of various kinds.

Q What was his standing in the profession?

A Very high?

Q What salary was he earning just prior to his death?

A $3000. a year.

Q Were you acquainted with his family?

A Yes, sir.

Q Whom did he leave surviving?

A A wife and child.

Q Sitting in court here?

A Yes, sir.

Q How close to Mr. Wellman did you live in Riverside?

A About 150 feet.

Q You both worked at the same place?

A Yes, sir.

Q What train did Mr. Wellman usually take in the morning to go from Riverside to go to his place of work?

A The train that left Riverside at 8:09.

Q Not the 8:05 train?

A No, sir, the 8:05 train is a through train, does not stop at Hawthorn.

Q Now how far did he have to go along the line of the railroad to the place where he was employed?

Objected to by counsel for defendant.

The Court: It is to show his familiarity with the location.

Mr. Peffers: I will withdraw the objection.

A About a mile, I should say.

Mr. McNaughton: What was the distance between Riverside, the town, village or suburb, and where Mr. Wellman
103 was employed?

A Oh, about 3½ miles.

Q What was the name of the suburb?

A Hawthorn.

Q Is Hawthorn on the line of the Burlington road?

A Yes, sir.

Q State whether or not he usually went from Hawthorn to Riverside at noon for lunch?

A Yes, sir.

Mr. Peffers: That is objected to; I move to strike it out.

The Court: It shows how familiar the deceased was with the route of travel of the railroad, that he knew all about it. He can answer.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Mr. McAnguthon: Did Mr. Wellman to your knowledge occasionally take any other train?

A Yes, sir.

Q What is the other train which he occasionally took from Riverside, or from the Harlem avenue station to Hawthorn?

A There is one due at Riverside at 8:40.

Q Due at Harlem avenue at 8:41?

A 8:41.

Q Did you ever take passage in company with Mr. Wellman on the 8:41 at the Harlem avenue station?

A Yes, sir.

Q Did you know at that time of the existence of an express that went through on the center track?

A Yes, sir.

Q In the morning?

A Yes, sir.

Q Did you and Mr. Wellman, while waiting at the Harlem avenue station for the 8:41 local ever see the express go through?

104 A Yes, sir.

Q About how long before the local was due at the Harlem avenue station have you seen the express go through?

Mr. Peffers: That is objected to.

The Court: Why, I think that is probably competent to show the knowledge of the deceased that there were several trains there, any of them liable to be there at any time. He may answer.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

A About ten minutes, I should say.

Mr. McNaughton: Did you learn of Mr. Wellman's death on January 3rd, 1906?

A Yes, sir.

Q Were you at Harlem avenue station that morning?

A No, sir.

Q You had taken the 8:09 that morning to work?

A Yes, sir, from Riverside station.

Q At Riverside?

A Yes, sir.

Q When did you learn that he was struck by the express at the crossing of Harlem avenue? Testim Wi Mot

A At about nine o'clock.

Q Do you remember the character of the morning, the weather?

A Yes, sir.

Q What kind of morning was it?

A It was rainy, drizzly, very disagreeable, foggy.

105 *Cross-Examination by Mr. Peffers.*

Q Mr. Motter, you say you live at Riverside?

A Yes, sir.

Q And you knew Harold Wellman, the deceased, in his lifetime?

A Yes, sir.

Q How long had you known him prior to his death?

A About two years.

Q Had he lived in Riverside all that time?

A No, sir.

Q How long had he resided in Riverside prior to his death?

A About a year.

Q And you lived about 150 feet from Mr. Wellman's house?

A Yes, sir.

Q What side of the track was that of the Burlington?

A The north side.

Q How far was his house from Harlem avenue crossing?

A About half a mile.

Q On the north side and half a mile west?

A Half a mile west.

Q Of Harlem avenue?

A Yes, sir.

Q Now was it Mr. Wellman's practice to get on this train that left Riverside at Harlem avenue station, or did he get on at Riverside station?

A Usually at Harlem avenue.

Q Was it his practice to take his train at Harlem ave-
106 nue more than it was Riverside?

A Yes, sir.

Q And you say that he went home to lunch from his work?

A Yes, sir.

Q And took the Burlington train at Hawthorn back to Harlem avenue?

A Yes, sir.

Q And got off this station at Harlem avenue, near where he met his death?

A Yes, sir.

Q And he went back home to lunch every day?

A Not every day; as a rule.

Q You say that he occasionally took the train that was due at Harlem avenue at 8:41?

A Yes, sir.

Q You say you saw him do that quite often?

A Quite a number of times.

Q Of course you have no idea how many times he took that train but he took it a number of times?

A A number of times.

Q And he got on the train at Harlem avenue?

A Yes, sir.

Q Did I understand you to say that you and Mr. Wellman had some conversation in his lifetime about this express train going through there?

Mr. McNaughton: Wait. There was nothing in the direct examination about any conversation. I do not think it is cross examination.

The Court: It might be cross examination; he might 107 desire to lay the foundation for some statement. He may answer.

To which ruling of the Court the plaintiff, by his counsel, then and there duly excepted.

A No, sir.

Mr. Peffers: Do you know whether Mr. Wellman saw the express come through occasionally mornings?

A Yes, sir.

Q You were there with him on the platform?

A Yes, sir.

Q And you know that he saw it?

A Yes, sir.

Q Sure of that?

A. I saw it. I don't know whether he did or not but it went through while we would be standing there.

Q You say the fast train was due there at Harlem avenue some ten minutes after the dinky went through, this 8:40 went through?

A It was due before that.

Q Before 8:40?

A Yes, sir.

Q Do you know whether that fast train has got a fixed schedule of time at Harlem avenue?

A I don't.

Q Do you want to say it went through every morning just before this dinky got to Harlem avenue?

A Approximately that time.

Q It would run all the way from one minute to ten minutes?

A It varied some.

Q Didn't it sometimes go through there after the dinky had gone?

A I couldn't say. I never was there after the dinky 108 had gone through.

Q Didn't you ever take a train that was later than 8:41?

A No, sir.

Q But you do say that the time of the fast train there varied?

A Yes, sir.

Q Compared with the time that the local was due there at Harlem avenue?

A Yes, sir.

Q You took the 8:09 train that morning?

A Yes, sir.

Q You say it was rainy that morning, foggy?

A Yes, sir.

Q How far could you see that morning?

A It is pretty hard to say—200 or 300 feet; it varied, of course.

Q Could you see 300 feet?

A I don't remember.

Q It was not a heavy fog, was it?

A It was considered a heavy fog, yes, sir.

Q Are you prepared to say that you could see 200 feet?

A No, sir.

Q Could you see 50 feet?

A You could see 50 feet.

Q Could you see 100?

A I don't know; I couldn't say.

Q Now that morning where did you board the train?

A Riverside.

Q Were you standing on the platform at Riverside when your train pulled in?

A I don't remember. It must have been around there close. I got the train.

Q. You don't know how foggy it was at 8:41, do you, after you had gone half an hour, at Harlem avenue?

A Not at Harlem avenue.

Q Now you came down that morning to Riverside station, came down the right side of the Burlington right of way, didn't you and crossed the street at the Riverside station?

A Yes, sir.

Q The Burlington station at Riverside is on the south side of the track?

A The station proper is.

Q When you came up that street leading to the Riverside station and got to the track, could you see the Burlington station on the opposite of the track?

A I don't remember.

Q Then you don't remember exactly how far you could see?

A No, sir.

Q You are not prepared to say whether your could see 50, 100 or 150 feet, are you?

A No, sir.

Re-direct Examination by Mr. McNaughton.

Q Do you know, when you said to the jury that Mr. Wellman lived about half a mile from the Harlem avenue station, did you measure along the highway in Riverside up to Harlem avenue and then due south to the station? Is that the way you estimated?

A I estimated the way we went down to the tracks and then north a block and west a block.

Q Was there a by-way from the vicinity where Mr. Wellman lived across the right of way to the Burlington?

Objected to by counsel for defendant.

Q That people going to Harlem avenue station used to take?

Objected to by counsel for defendant.

The Court: I cannot see the materiality of that.

Mr. McNaughton: We expect to be able to show that he did take that path, in fact there is some evidence now before the jury, as I recall the evidence, that he was going along

the right of way of the Burlington, from the west towards the east.

The Court: Suppose he did; because other people took it is not material.

Mr. McNaughton: Only for the purpose of laying the entire situation before the jury.

The Court: So far as this transaction is concerned; but other people's transactions sheds no light on this transaction at all. You cannot try everybody in this case.

Mr. McNaughton: State whether or not there was a pathway leading along the Burlington right of way.

Objected to by counsel for defendant.

The Court: If there was it would not give anybody a right to walk on the right of way. I don't regard that as material here. He was not hurt at that place; he was hurt at the crossing. The other matter is wholly immaterial, how he got there.

111 Mr. Peffers: I think it is wholly immaterial. It is shown that he came down that track. It is already in evidence what they are trying to show now.

Mr. McNaughton: If that is so, why object to it?

The Court: He travelled over the highway; that is proved already; whether very many or few people traveled there is wholly immaterial. If many people traveled there or few people traveled there it would not give any people the right to travel there. There is no such thing as getting a highway by prescription over the right of way of the railroad unless the railroad abandons it in the first instance.

To which ruling of the Court the plaintiff, by his counsel, then and there duly excepted.

Mr. McNaughton: Do you know the route Mr. Wellman was accustomed to travel between his home and the Harlem avenue station?

A Yes, sir.

Q How describe to the jury what that route was.

A Well, he came down the street he lived on to the next crossing and then went south up to a cinder path that led over the "Q" tracks, and and that path was ten or fifteen feet north of the "Q" tracks and he took that up to Harlem avenue.

Q That was north of the north track?

A That was north of the north track.

Q Do you know whether or not Mr. Wellman at times took a street car?

A Yes, sir.

112 Objected to by counsel for defendant.

The Court: I don't think that is material. I don't think any trip this man made except the one in question here, is material.

Mr. McNaughton: Do you recall now in what direction the wind was blowing that morning, in what direction it was blowing?

A From the east.

Q That is all, I think.

113 JAMES LANE, called as a witness on behalf of the plaintiff, being first duly sworn, was examined in chief by Mr. McNaughton, and testified as follows:

Q State your full name?

A James Lane.

Q Where do you reside?

A 1687 Ogden avenue, Chicago.

Q What is your business?

A Motorman.

Q How long have you been a motorman?

A About fourteen years.

Q By whom were you employed as a motorman on January 3rd, 1906?

A The Consolidated Traction Company.

Q On what line of the Consolidated Traction Company were you running a car on January 3rd, 1906?

A The Berwyn line.

Q Where was your starting point?

A 40th and Ogden.

Q And your ending?

A Lyons.

Q Where is Lyons situated with reference to Berwyn and Riverside?

A South-west of Berwyn.

Q Starting at Lyons to go on your return trip just describe to the jury the course that you would travel over with those cars?

A Go east to Harlem avenue, north on Harlem avenue to Stanley avenue.

Q To where?

A To Stanley avenue, and east on Stanley avenue.

Q What direction does Harlem avenue run between 114 Lyons and Stanley avenue? Testimo James

A North and south.

Q How far north of the Burlington tracks do the street cars turn on Stanley avenue?

A About 35 feet.

Q And then from that east your line ran parallel with the Burlington?

A Yes, sir.

Q Do you know that Harlem avenue is the dividing line between Riverside and Berwyn?

A It is.

Q The center of that street is the city limits?

A Yes, sir.

Q. Where is the street car track? Is it in Berwyn or Riverside or partly in Berwyn and partly in Riverside?

Objected to by counsel for defendant as immaterial.

The Court: I cannot see how that is material in this case.

Mr. McNaughton: The location of that track just at that crossing might be material.

The Court: It is immaterial whether it was in one city or the other, or in both. But the physical location is proven beyond any possibility of contradiction. Nobody will ever dispute that in this case.

Mr. McNaughton: Pardon me. I have not had the experience in this court.

The Court: You have in other courts.

Mr. McNaughton: But I have this in mind. It is in proof now that the conductor on reaching this cross went to 115 the intersection of the street car track and the railroad. Now, that makes it material to show just where the railroad is situated in the street. It might be situated at the extreme south side of the highway or extreme north side.

The Court: That is not the question you asked. You asked in what city or village it was. You might prove where it was with reference to the street, whether one side or in the center or wherever it was.

Mr. McNaughton: I beg the court's pardon. I was intending to prove it that way, because I have proven that the center line of the highway was the city limits.

The Court: Get right at what you want. Then we will not object perhaps.

Mr. McNaughton: Where was the street car track in Harlem avenue, on the Berwyb side or Riverside?

A It was on the Berwyn side.

Objected to by counsel for defendant.

The Court. He says his object is now to show on what part of Harlem avenue the street car track was located.

Mr. Peffers: I will take an exception. I did not know the court had ruled on the question.

The Court: He says he has already proved that the center line of the street was the dividing line between the villages.

Objection overruled by the court; to which ruling of the
116 court, the defendant, by its counsel, then and there duly excepted.

Mr. McNaughton: Now, do you mean by that that both tracks, the entire track of the street car was in Berwyn and east of the center of Harlem avenue?

Objected to by counsel for defendant as immaterial.

The Court: It is only material to show the location of the street car with reference to the avenue, and that purpose he avows for it. He may prove it. He is doing it in an indirect way, but nevertheless if it is competent for the purpose it is all right.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

A The tracks are on the Berwyn side.

Mr. McNaughton: Entirely?

A Yes, sir.

Q Is the Harlem avenue road the main line between Lyons and Hawthorn?

Objected to by counsel for defendant as immaterial. Objection overruled by the court. To which ruling of the court, the defendant, by its counsel, then and there douly excepted.

A I believe it is.

Q The road which is travelled the most extensively, is it?

Objected to by counsel for defendant as immaterial. Objection sustained by the Court. To which ruling of the
117 court, the plaintiff, by his counsel, then and there duly excepted.

Q Do you know the width of the right of way of the Burlington on the line of Harlem avenue?

A I don't.

Q How many main tracks on the railroad at that point?

Objected to by counsel for defendant as immaterial.

The Court: There is no dispute about that. It is admitted there are three, no less and no more.

Mr. McNaughton: If it is proved.

The Court: It is proved beyond the possibility of contradiction that there are three main tracks.

Mr. McNaughton: Which is the south-bound track, for the local trains?

Mr. Peffers: That has been gone over.

Mr. McNaughton: Is that all admitted?

Mr. Peffers: It is in the proof.

The Court: The south track has been proven and not disputed as the east-bound main, and the other in the center is in the forenoon the east-bound and in the afternoon the west-bound.

Mr. McNaughton: If that is admitted.

The Court: I think he admitted it virtually.

Mr. Peffers: Why I cross examined on it.

The Court: He says he admits it now.

Mr. Peffers: Yes, I wanted to state—

118 The Court: That is settled. Go ahead.

Mr. McNaughton: What is the distance between Riverside station and Harlem avenue station? Is that admitted?

Mr. Peffers: That has been gone all over.

The Court: He will not dispute your witnesses on that.

Mr. Peffers: No, it may be a mile or a mile and an eighth or three quatrers: it is approximately a mile.

Mr. McNaughton: I do not think I am precluded because one witness testifies to a certain state of facts from putting other witnesses on to prove the same facts.

The Court: By no means if it is a material point and the matter is disputed. If it is an immaterial point and it is not disputed why prove it again? Counsel says he does not dispute it. It is not necessary then to spend any further time on it.

Mr. McNaughton: Were you at the crossing of the Chicago, Burlington & Quincy Road at Harlem avenue on the morning of January 3rd, 1906, when Mr. Wellman was killed?

A I was.

Q What duties were you performing that morning?

A I was running a car.

Q As a motorman?

A Yes, sir.

Q Where were you situated in the car?

A Standing on the front platform.

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ne.

Q What kind of car did you have as to being an open car or closed car?

A It was a closed car.

Q A winter car?

A A winter car.

119 Q You stood on the vestibule?

A Yes, sir.

Q State whether or not the vestibule was open or closed?

A The vestibule was open.

Q Opon on both sides?

A Yes, sir.

Q Did you see Mr. Wellman when he was struck?

A Yes, sir.

Q Where was Mr. Wellman at the time he was struck?

A He was about at the middle of the crossing.

Q When you refer to the crossing now do you mean the street car track?

A Yes, sir.

Q How far was he thrown?

A I don't know. I couldn't say that exactly. I think probably 75 or 100 feet.

Q Did you see where the body landed?

A I did.

Q Where did it land?

A It landed between the center and the south track.

Q At that time state whether or not the local east-bound, commonly called the dinkey, was at the Harlem avenue station?

A I was.

Q Receiving passengers?

A Yes, sir.

Q With reference to the dinkey where did the body fall on the right of way?

A Near the rear car, the rear end of the rear car.

Q Do you know the express which struck Mr. Wellman, as No. 48? Did you know it by its number?

A I didn't know it by its number, no, sir.

120 Q Did you stand continuously at that crossing at your post in front of the street car on the vestibule?

A Yes, sir.

Q Was there anybody along with you that you recall?

A There was nobody on the platform.

Q Do you remember who were passengers on that morning?

Objected to by counsel for defendant as immaterial; objection sustained by the court. To which ruling of the court, the plaintiff, by his counsel then and there duly excepted.

Q Do you remember whether or not you had passengers that morning?

Objected to by counsel for defendant as immaterial. Objection sustained by the court. To which ruling of the court, the plaintiff, by his counsel, then and there duly excepted.

Q Were you looking for the approach of a train from the west on the middle track as you stood on the vestibule of that car?

A Probably I was.

Q I ask you if you were?

A Yes, sir.

Q How fast was the express on the center track going east as it went over the Harlem avenue crossing?

A Well, that is pretty hard for me to say.

Q What is your best judgment?

Mr. Peffers: He has not qualified yet that he knows what the speed was.

121 Mr. McNaughton: It goes in for what it is worth, his judgment on that point.

A Thirty-five to 45 perhaps, 45 miles an hour.

Q Did the express stop after it struck Mr. Wellman?

A It did.

Q Did you have an opportunity to observe where it was stopped afterwards?

A Yes, sir.

Q How far east did it run before it was stopped?

A About five blocks I should judge.

Q Close to the Berwyn station?

A West of the Berwyn station.

Q How many feet in the blocks would you estimate?

Objected to by counsel for defendant. Objection sustained.

Mr. McNaughton: Your Honor, the purpose is to show as near as possible the exact distance that the train ran before it stopped.

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ne.

The Court: That is wholly immaterial how far it ran or whether it stopped at all or not.

Mr. McNaughton: I am willing to always abide by the rulings of the court, but I have this idea in mind that the distance that the train runs past a given point after an effort is made to stop is a circumstance to determine the speed of the train.

The Court: You have not shown that there was any effort made to stop it.

122 Mr. McNaughton: But I propose to show that.

The Court: I will sustain the objection. I don't think that that would make any difference either in this case.

To which ruling of the court, the plaintiff, by his counsel, then and there duly excepted.

Mr. McNaughton: State whether or not the local pulled in as you got to the crossing that morning on the south track?

Mr. Peffers: He has already stated that the local was standing there when Mr. Wellman was going along there.

The Court: He has not stated when it pulled in. He may state that.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

Mr. McNaughton: Did it pull in as you got to the crossing?

A Yes, sir.

Q After the local pulled in state whether or not a train went west on the north track?

A I think it did.

Q Do you know the number of that train?

A I don't.

Q Did it stop at the Harlem avenue station?

A No, sir.

Q Or go clear through?

A It didn't stop there.

Q Do you remember what kind of morning this was January 3rd?

A It was raining.

Q Is that the only thing you now recall that is descriptive of the condition of the weather that morning?

A Well, it was disagreeable. There was some fog 123 and it was blowing.

Q How was the wind blowing?

A From the east.

Q What was the character of the wind as to being strong or otherwise?

A Well, it was blowing pretty strong.

Q Did you observe whether or not steam and smoke were being emitted from the engine of the local as she stood at the Harlem avenue station?

Mr. Peffers: That is objected to as leading.

Mr. McNaughton: I will confess it is somewhat leading, and I will put the question in another form.

Q Was there any steam or smoke being emitted from the engine that was hauling the local that morning?

A I think there was.

Q How did that steam go? Did it lie upon the track, or rise?

Objected to by counsel for defendant as leading.

The Court: He may describe that.

Mr. McNaughton: How did the smoke go that came from the local?

A It blowed towards the west.

Q Over the Harlem avenue crossing?

Objected to by counsel for defendant as leading.

The Court: He may tell which way it went.

Mr. Peffers: He said to the west.

Mr. McNaughton: How long had you been motorman on that line?

A Something over two years.

Q On January 3rd, 1906, how many street cars or with what frequency did street cars pass over the Burlington right of way on the line of Harlem avenue between half
124 past seven and nine o'clock.

Objected to by counsel for defendant as immaterial. Which objection was sustained by the court. To which ruling of the court, the plaintiff, by his counsel, then and there duly excepted.

Cross-Examination by Mr. Peffers.

Q On that line on the morning in question you came up to the Burlington right of way on Harlem avenue from the south?

A Yes, sir.

Q That was on the return trip from Lyons, was it not?

A Yes, sir.

Q Now, you came up there and stopped?

A Yes, sir.

Q How far did you stop your car from the south rail of the south track?

A About fifty feet.

Q You stood there in the vestibule?

A Yes, sir.

Q Looking through the window?

A Yes, sir.

Q Did you have a window on the side, or was the door open on the side?

A There is no doors on the car I had.

Mr. McNaughton: Did you hear the bell or whistle on the express as she approached Harlem avenue crossing that morning?

A I don't recollect of hearing it.

125 Mr. Peffers: Now, Mr. Lane, the last think I asked you was, as you came up to the Burlington track you were there about 50 feet south of the south track. How soon did the local pull in after you got up to that point 50 feet south of the main track?

A Perhaps half a minute or less.

Q It ran down and stopped at Harlem station?

A Yes, sir.

Q How far east of Harlem avenue is the Burlington Harlem avenue station?

A Perhaps 100 or 150 feet.

Q Did the engine of the local run by the station?

A I didn't notice.

Q How far was the rear end of the local from Harlem avenue when it stopped at Harlem avenue?

A Perhaps 100 feet.

Q And you could see that far?

A Yes, sir.

Q Now you stated in response to Mr. McNaughton's question that you saw Mr. Wellman when the engine struck him?

A Yes, sir.

Q When was the first time that you saw Mr. Wellman?

A I saw him coming down the tracks.

Q How far west of Harlem avenue was Mr. Wellman the first time you saw him? That is, how far west of Harlem avenue was Mr. Wellman when you first saw him?

A About 75 feet.

Q Where was he at that time with respect to the north

main track? Was he outside of the north main or inside of it?

A I could not say. He was either on the track or right beside it.

126 Q And from your point of view you could not tell and did not notice accurately whether he was outside or between the rails of the north track?

A No, sir, I couldn't tell.

Q Had the local pulled in by that time?

A Yes, sir.

Q The local was standing there and then you looked down and saw Mr. Wellman?

A Yes, sir.

Q Was he running or walking?

A He was walking, and then he started to run.

Q He started to run when the train stopped at the station?

A Yes, sir.

Q What is the fact as to whether he had an umbrella over his head when you first saw him?

A He had.

Q What did he do with respect to the umbrella?

A He lowered the umbrella and started to run.

Q Now, you spoke of some other train that went west on the north track. That train had gone, hasn't it, when you saw Mr. Wellman?

A Yes, sir.

Q Had been gone some time, hadn't it?

A I don't know how long, but it had passed.

Q And it was clear out of sight, wasn't it?

A Perhaps it was. I don't recollect now.

Q There was not any train at all, was there, on the north main track anywhere near Mr. Wellman when you first saw him?

A No, sir.

Q Now we left Mr. Wellman running down Harlem
127 avenue towards the east. What course did he take towards Harlem avenue with respect to the center tracks?

A Diagonally.

Q He must have run a short distance on the north track or the west bound main?

A Yes, sir.

Q What is the fact now as to whether or not he ran down the west bound main or north track, as we have called it?

A I think he ran down the north track.
Q He ran all the time, didn't he, after he started on a run?
A Yes, sir.
Q How far did he continue in the west bound or north track?
A Until he got within 12 or 15 feet of the crossing.
Q And then what did he do?
A Then he ran diagonally across the crossing.
Q And then what happened?
A The train struck him; it hit him fair on the crossing.
Q So they collided on the crossing in about the center of the square formed by your street car track and the Burlington tracks?
A Yes, sir.
Q How far down the tracks could you see that morning to the west?
A Perhaps 200 feet.
Q Are you sure you could not see any further than that?
A Well, I could not say exactly.
Q Now you were 50 feet south of the track?
A Yes, sir.
Q The right of way there is 75 to 100 feet wide, is it?
A Yes, sir.
128 Q That carried you across diagonally and you could see Mr. Wellman distinctly, couldn't you?
A Yes, sir.
Q Couldn't you see these telegraph poles over here that I show you on the photograph?
A I could see the nearer ones.
Q That would take you a distance of 400 feet, would it not?
A I don't know how far it is.
Q You don't undertake to be accurate that you could only see 200 feet; anywhere from 200 to 500 feet? Your vision does not stop in a fog right at a given point?
A I don't know about that. The fact is I was not paying much attention to the distance that I could see in the fog that morning looking up the track.
Q But you had no trouble at all in seeing all Mr. Wellman's movements?
A I could see Mr. Wellman's movements, yes, sir.
Q Where was Mr. Sullivan, your conductor, while you were on the front end, waiting for the train?
A He was out on the crossing.

Q Did you hear Mr. Sullivan holler at Mr. Wellman?
A I did.
Q Where was Mr. Wellman when Mr. Sullivan hollered at him?
Mr. McNaughton: I don't like to be captious, but I don't think this is cross-examination.
The Court: Everything that occurred there is part of the cross-examination; it is part of the res gestae.
Mr. McNaughton: But must not the cross-examination be germane to what was brought out on the direct?
129 The Court: Yes, but you opened the subject as to everything that occurred there. This is part of the general transaction. He may answer.
Q (Question read.)
A He was near the west line of the street car tracks.
Mr. Peffers: He was between the north and the center tracks?
A Yes, sir.
Q And pretty near to the west track of the street cars?
A Yes, sir.
Q Between the south rail of the north main and the north rail of the center?
A Yes, sir.
Q How far away was the engine at that time when Mr. Sullivan you hollered at him?
A I couldn't say; it was getting pretty close.
Q Wasn't it 50 or 60 feet?
A Perhaps.
Q That is about your estimate?
A I should judge it was; it was pretty close to it.
Q Going at that speed, 35 to 45 miles an hour, I think you said, it was about 50 to 75 feet away? In order to have the collision at that time that is about where it would have to be, is it not?
A I think it would.
Q Is it not a fact the train was 50 to 75 feet from Mr. Wellman, just as Mr. Sullivan hollered at him?
A I couldn't say as to that.
Q Well, about that?
A I don't think it was 75 feet.
130 Q Was it 50?
A I think it was about 50, perhaps.
Q What did Mr. Wellman do when Mr. Sullivan, your conductor, hollered at him?

A To the best of my judgment he did not realize it; he did not hear it.

Q You think he did not know the train was coming?

A I think he didn't hear it.

Q You saw the train coming, didn't you?

A At that time, yes.

Q You had your eyes on Mr. Wellman most of the time, practically all of the time he was running down there?

A Yes, sir.

Q Did you see him look back to see if that train was coming?

A I did not.

Q And you were watching him all the time?

A Yes, sir.

Q Have you any idea what the distance between the rails is there at that point?

A I don't know.

Q It is about 14 or 15 feet, is it not?

A I can't say exactly.

Q Is it not about that?

A I should judge it was.

Q You judge so?

A Yes, sir.

The Court: You mean the tracks instead of the rails?

Mr. Peffers: The tracks, yes, sir, the railroad tracks. Now your attention was not called particularly, was it, as to whether or not the train blew a whistle, was it?

A Not in particular, no.

131 Q You were paying attention to Mr. Wellman and didn't notice whether the bell was ringing or not; isn't that the fact?

A Yes, sir.

Q This train is a big express train, is it, has seven or eight cars?

A I don't know how many cars it has.

Q What is your estimate on that?

A Perhaps six or seven.

Q And this engine was a large engine, wasn't it?

A I didn't notice the engine at all.

Q Well, it made a good deal of noise, didn't it, when it approached the crossing there?

A Yes, sir.

Q You heard it?

A Yes, sir.

Q You knew it was coming there?
A Yes, sir.
Q Were you looking out the side door of your car at the time the express came along?
A No, sir.
Q You were looking straight ahead?
A Out of the front window.
Q You didn't look out the side to see the train coming?
A No, sir.
Q It just came in front of you?
A Yes, sir.
Q How far away was the express train from Harlem avenue from the west when you first discovered it was approaching?
A I suppose it was 300 feet.
Q And all that time Mr. Wellman was running down towards Harlem avenue station?
A Yes, sir.
Q With his back to the train?
A Yes, sir.

Q Well, Mr. Lane, there was not any smoke around
132 there that obstructed your view at all west of Harlem avenue, was there?
A Yes, sir, there was some.
Q But still you could see Mr. Wellman way down there 75 feet west, couldn't you?
A Yes, sir.
Q Was there anything to prevent Mr. Wellman seeing the train if he had looked back?

Mr. McNaughton: That is objected to as calling for the conclusion of the witness.

Objection sustained by the court. To which ruling of the court, the defendant, by its counsel, then and there duly excepted.

Mr. Peffers: Was there anything between Mr. Wellman and the train, any object of any kind? It was all open?
A Yes, sir.
Q Perfectly open?
A Yes, sir.

Re-direct Examination by Mr. McNaughton.

Q Now, Mr. Lane, you estimate that Mr. Wellman was 75 feet west of the crossing when you first saw him?

A Yes, sir.

Q Do you mean by the crossing the street car track?

A West of the street car track.

Q Yes, west of the street car track?

A Yes, sir.

Q You think he ran straight east for a short distance?

133 A Yes, sir.

Q And then he proceeded diagonally toward the intersection of the street car track, and the center of the railroad track, is that right?

A Yes, sir.

Q Did he come, after he turned on a diognal line, did he come practically straight for the center of the railroad track?

A I think he did.

Q Now, you saw the engine coming east on the center track?

A Yes, sir.

Q When you saw that engine coming you were not looking at Mr. Weyyman, were you?

A They were both before me.

Q Did you keep your eye on Mr. Wellman all the time without taking it away so as to be able to know just what his conduct was every instant of time from the time you first saw him?

A Perhaps I did not. They were both right in front of me and I saw both of them.

Q Did you take more notice of Mr. Wellman after you saw the train and saw the precarious condition he was in?

A That was the time.

Q There was nothing prior to that time to attract your attention particularly?

A No, sir.

Q How close was Mr. Wellman to the intersection of the street car and the center track of the railroad when you appreciated his great danger?

Objected to by counsel for defendant as not re-direct

134 examination. Objection sustained by the court. To which ruling of the court, the plaintiff, by his counsel, then and there duly excepted.

Q How close was he to the intersection of the street car

track and the center track of the railroad when you first noticed the engine coming east?

A Probably twenty feet.

Q Tell the jury what your judgment is as to the width of Harlem avenue from the south side on the Riverside of Harlem avenue, from the west side of the street in Riverside to the east side of the street in Berwyn?

Objected to by counsel for defendant.

Q I want to know approximately.

The Court: It is not re-examination. You are going right over your case again.

Mr. McNaughton: I forgot it on redirect.

The Court: If you put it on that ground he may answer.

A You mean the main width of the street?

Mr. McNaughton: I mean from fence to fence, from Riverside west line to the Berwyn west line?

A Perhaps 60 feet. I would estimate it at that.

Q Does it appear to be the width of a four-rod highway?

A Perhaps it is.

Mr. Peffers: Mr. Lane, I think you said to me that when Mr. Sullivan hollered at him he was between the two rails and that the engine was then 50 or 60 feet away. You 135 don't change that any, do you?

A Of course I can't say just the exact distance.

Q You said about 50 feet; is not that so?

A Perhaps.

Q Is it not about that?

A It may be.

Mr. McNaughton: Did you say on the cross-examination, Mr. Lane, that Mr. Sullivan called to Mr. Wellman as he was approaching the street car intersection?

A Yes, sir.

Q Did he do anything else in the way of making a gesture, or anything?

A He motioned with his hand, yes, sir.

Q Which hand?

A I couldn't say.

Q Swung his hand?

A He swung his hand, yes, sir.

of H. Roe.

GEORGE H. ROE, called as a witness on behalf of the plaintiff, being first duly sworn, was examined in chief by Mr. McNaughton, and testified as follows.

Q State your full name?
A George H. Roe.
Q Where do you reside?
A Riverside.
Q How long have you lived at Riverside?
A About two and a half years.
Q Did you live anywhere near Harold Wellman?
A About one block away.
Q Where were you employed on and before January the 3rd, 1906?
A At the Western Electric.
Q Was Mr. Wellman the deceased employed at the same place?
136 A He was.
Q What was his profession?
A He was a designer of motors for the Western Electric Company.
Q An electrical engineer?
A An electrical engineer.
Q What is your profession?
A An electrical engineer.
Q How long did you know Mr. Wellman prior to his death?
A About one year.
Q Was he employed during that year at the works of the Western Electric?
A He was.
Q What was his standing in the profession?
A It was very good, very good.
Q What was his salary immediately prior to his death, if you know?
A $250 a month, I believe.
A Juror: Speak a little louder, please.
The Witness: $250 a month.
Mr. McNaughton: Do you remember the occasion of his death.
A Yes, I do.
Q Where were you at the time it is said to have occurred?
A I was in Fort Wayne, Indiana.
Mr. Peffer: Where?
A In Fort Wayne, Indiana, on a vacation.

137 *Cross-Examination by Mr. Peffers.*

Q Mr. Roe, how long did you know Mr. Wellman in his lifetime?
A How well?
Q How long?
A How long, about one year.
Q Twenty years?
A About one year.
Q Oh, one year, I beg your pardon. And he was a designer of motors for the Western Electric Company at Hawthorne?
A Yes, sir.
Q Did you see him often?
A Very often, my desk was next to his.
Q And you say he was a designer of motors, that is he sat down and made the drawings?
A No, he did the calculating of the motors.
Q The what?
A He calculated the motors, determined the proper amount of iron and copper and—
Q Oh, he did the figuring?
A He did the figuring, yes.
Q Yes. Did he use his eyes in that business?
A His eyes?
Q Yes.
A Most assuredly.
Q His eyesight was good?
A His eyesight was good.
Q And was his hearing good?
A So far as I know.
Q Well, so far as you know. You talked with him every day, did you not?
A Yes.
138 Q Did you every see any trouble in his hearing in conversation?
A No, I don't remember.
Q Well, his eyesight and his hearing were normal, weren't they?
A So far as I know.
Mr. Peffers: That is all.

of H. Roe.

Re-direct Examination by Mr. McNaughton.

Mr. McNaughton: Now, your Honor, I don't desire to consume time, and I confess I don't know what the practice is in the Federal Court in making an offer on proofs that the court has ruled as incompetent. I desire now if permitted to prove by this witness the population of the two villages, the manner in which the two villages are divided up by the railroad, how the population is distributed, one half on the north side and one half on the south side of the track, the extent to which the public used the Harlem avenue crossing—and it strikes me very forcibly your Honor, that that is competent proof, and I would like to submit some authorities. I think I can submit some decisions of your Honor's when you were on the Appellate bench on the proposition, but if the court still adheres to the original ruling I would like to have my record in proper shape, that is all.

139 The Court: I know there are a class of cases—

Mr. McNaughton: I did not understand what the court said.

The Court: I know there is a class of cases in which you may prove in these crossing accidents how thickly settled the community is and the uses made of the highway in order to show that the train ran recklessly with regard to the rights of the public. I understand there is a line of authorities of that kind. When I ruled upon that question I did not conceive that that rule applied in this case from the facts of it. I am not yet satisfied that it does, but I will let you make that proof by this witness anyhow, let you get it in the record.

Mr. McNaughton: I desire to say to the court fearing that the court has not looked at the pleadings that it is specially averred.

The Court: In your declaration here. I still am of the opinion and I am subject to change, of course, that that rule that you invoke here has no application to the facts and circumstances of this accident. I may have occasion to say something more about that later, but I will let you make that proof with this witness.

Mr. Peffers: I will preserve an exception to the ruling of the court.

The Court: Yes, sir.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

140 The Court: That is the population and the general use of the street, that is all I rule upon.

Mr. McNaughton: How does the Chicago, Burlington & Quincy Railroad run through the villages of Riverside and Berwyn, in what direction?

A From east to west dividing equally.

The Court: There is no dispute about that.

Mr. McNaughton: Well, that is merely preliminary your Honor.

The Court: All right.

Mr. McNaughton: How does it divide the two villages?

A It splits them equally, the two parts being about the same size.

Q That is it splits Berwyn in two and Riverside in two?

A In two.

Q What was the population approximately in January 1906 of Riverside?

A I don't remember having seen the exact figure on that but I believe it was something like 2500.

Q And what approximately was the population of Berwyn at the same time?

A I think about 3500.

Q And the west line of Berwyn is the east line of Riverside?

A Yes, sir.

Q The two corporations join each other?

A Yes, sir.

Q How is the population in Berwyn divided as to the tracks, is it about divided equally one half on one side and one-half on the other?

141 Mr. Peffers: Well, now, just a moment. There is no proof here to show that the people, either on one side or the other ever went across this right of way or had the slightest use.

Mr. McNaughton: I just want to show the physical condition that is all.

The Court: Well, I shall let him make his proof.

Mr. Peffers: I understand, I just want to preserve the record.

The Court: Over your objection. Of course you are entitled to your exception and I understand of course counsel have a theory about this case and I want him to have the benefit of it so far as it is proper.

Mr. McNaughton: What is your answer to that question.

of H. Roe.

What proportion of the population of Berwyn is on the south side and what proportion on the north side of the tracks?

A I think they are about equally divided.

Q And how about the grocery stores and business houses, on which side of the track are they chiefly located?

A On the south side of the track.

Q To what extent is Harlem avenue used by the traveling public at the point where it crosses the Chicago, Burlington & Quincy road?

A I think it is very largely used by the public.

Q State whether or not it is the chief highway across the tracks in the village of Berwyn?

142 A I don't think it is in the village of Berwyn but between the villages of Berwyn and Riverside I believe it is.

The Bailiff: The jurors say they can't hear a word you say.

The Witness: Between the villages of Riverside and Berwyn I believe it is the chief one.

Mr. McNaughton: Is it the only highway in the village of Berwyn upon which a surface street railroad is operating across the tracks of the Burlington?

A I believe it is.

Mr. Peffers: I want it understood I preserve an exception to this line of testimony.

The Court: I know. This is all over your objection and you have an exception.

Mr. McNaughton: Now with what frequency do street cars or did street cars cross the Burlington on the line of Harlem avenue on January the 3rd, 1906? How often can you get a car at that point?

A I believe we count on one every fifteen minutes, sometimes they run oftener, I think every ten minutes.

Q Didn't they run oftener early in the morning than later in the day.

A I believe they did.

Re-cross Examination by Mr. Peffers.

Q. Mr. Roe, the tracks of the Burlington run directly
143 west of Harlem avenue?

A Yes.

Q No curve there?

A Yes.

Q The country west of Harlem avenue to the south of the

Burlington tracks is an open field for a great distance both running west and south of the Burlington tracks?

A South.

Q Yes, I show you "Defendant's Exhibit 2," and now do you know what that photograph represents, do you recognize it (showing witness photograph)?

A Yes.

Q What is it?

A It is Harlem avenue.

Q Yes, and it shows the Burlington track west of Harlem avenue, doesn't it?

A Yes.

Q Now, that is all open space down there, isn't it, it is a field?

A Yes.

Q And it is the same over here (indicating on photograph), isn't it, except a house or two. That is the first house, isn't it (indicating), that is west of Harlem avenue and north of the two tracks at that point, that little house that sits right in there (indicating)?

A Yes, that is right.

Q There aren't very many houses are there on the north of the Burlington, to the north of the Burlington track and west of Harlem until you get clear down in Riverside, is there, down near the center of the town?

A No.

Mr. McNaughton: Your Honor, may I be permitted to 144 make the same proof with Mr. Marter?

The Court: Well, is this the spirit as a matter of fact?

Mr. McNaughton: It is material and shows the competency. This is as to its materiality and competency.

The Court: Materiality and competency. He won't dispute the evidence of this witness on this subject as a matter of fact.

Mr. Peffers: No, But I object to its competency and materiality.

The Court: Yes, I know. You have got the benefit of all that. Then it no use accumulating.

Mr. Peffers. No.

Mr. McNaughton: Well, your Honor, I would like to call a witness in view of what the witness just stated on the witness stand as to the number of cars. I would like to call a witness who is more familiar with the fact.

The Court: All right.

J. of Sulli- JOHN E. SULLIVAN, recalled as a witness on behalf of the plaintiff, was further examined by Mr. McNaughton, and testified as follows:

Q You have already been sworn, Mr. Sullivan?
A Yes sir, yesterday.
Q Between half past seven o'clock and say nine o'clock
145 in the morning in the month of January, 1906, on the 3rd day of that month and prior to that time with what frequency did street cars pass over the Harlem avenue crossing of the Burlington?
Mr. Peffers: I make the same objection.
The Court: Well, yes, I will overrule the objection now under the circumstances. He may answer.
To which ruling of the court, the defendant by its counsel, then and there duly excepted.
A Why, the schedule on the route out in the morning from seven to nine o'clock was ten minutes and after nine fifteen minutes up until about four in the evening till the rush begins again and it is ten minutes after that hour.
Mr. McNaughton: Now does that mean that there would be a car passing over every five minutes?
A Well, in opposite directions it would.
Q Yes, one going north every ten minutes and one coming south every ten minutes?
A Yes, sir.
Q That would make a car go over the crossing every five minutes?
A Yes, sir.
Mr. McNaughton: Now there was one point in his testimony yesterday I was not clear on your Honor, that I would like to ask him now, begging the court's pardon for forgetting.
Q When you state, Mr. Sullivan, that at the time you saw the train going east on the central track and at which time Mr. Wellman was within 15 or 20 feet of the crossing
145½ what did you mean by the crossing?
Mr. Peffers: I object to cross examining his own witness.
The Court: Of course he said he had some doubt about it. My recollection is this witness said it was the crossing of the street car track, and the central track.
Mr. McNaughton: Yes, is that what you meant?

A I meant from the intersection of the car track and the railroad center.

Mr. Peffers: That is exactly what he said yesterday—what I understood him to say.

The Court: He said he was struck right on that.

Mr. McNaughton: The question now is your Honor what did he mean by the crossing.

The Court: Well, he has told now what he meant.

The Witness: I meant by the crossing the street car crossing.

Mr. McNaughton: Yes, that is all, Mr. Sullivan.

Mr. Peffers: That is all. I have not misunderstood him.

The Court: Are your witnesses absent?

Mr. McNaughton: Yes, your Honor.

The Court: Perhaps counsel will admit what they would testify to if they were here.

Mr. Peffers: Yes, I would be glad to hear.

The Court: If you would say what you expect to prove by them—that is I suppose your evidence would be accumu-
146 lative evidence—then he would admit that they would so testify.

Mr. McNaughton: Well, I expect to prove by Mr. Thomas that he is a resident of Riverside and was on and prior to January 3rd, 1906, that on that morning he was a passenger on the local which left the Harlem avenue station at 8:40 or was due at the Harlem avenue station at 8:41, that the express train going east on the center track was running at a high rate of speed, going very fast. I am not able to state now how many miles an hour he would say; that the population of the two villages is substantially as testified to by Mr. Roe; that the villages are divided substantially as testified to by Mr. Roe; that more people pass over the Harlem avenue crossing of the Burlington than pass over any other crossing within the same length of time in the village of Berwyn in short that Harlem avenue is the principal traveled highway between Lyons and Hawthorne. I think substantially that is all.

Mr. Peffers: Without at all admitting its competency I will admit that that witness would so testify and it is admitted over my objection. I will preserve all of my exceptions.

The Court: Yes, I don't think I would allow the witness

of Sulli- to characterize the speed of that train as a high rate. That is a matter of opinion.

Mr. Peffers: Well, one gentleman here put it at from 35 to 45 miles an hour. That is in evidence already.

The Court: Yes.

147 Mr. McNaughton: How about the gentleman that put it at 50, is it not a question of fact?

The Court: How is that?

Mr. McNaughton: I ask about the witness that put it at 50. It is still a question of fact as to the speed of the train.

The Court: Yes, but high rate of speed is a relative term and a matter of opinion. You used the word "Very."

Mr. McNaughton: Very fast.

The Court: But I might strike out the word "high" and let it stand at very fast.

Mr. Peffers: Well, I think there are cases that hold that a witness may state if the train was running slow and was running fast.

The Court: Yes, they can do that.

Mr. Peffers: Well, I meant that in the sense of fact.

The Court: Yes, I will strike out the word "high" on your objection. That would leave it fast rate.

To which ruling of the court, the defendant, by its counsel, then and there duly excepted.

Mr. McNaughton: Oh, another thing I intended to prove by Mr. Thomas was that the express east-bound was late from five to seven minutes that morning at the Harlem avenue station.

Mr. Peffers: Well, I could not admit that because as 148 to that thing we have no definite time.

The Court: Another witness did testify to that. I think that witness said ten.

Mr. McNaughton: Yes, ten is what the other witness said.

Mr. Peffers: Well, I will admit that he would so testify.

The Court: That he would so testify?

Mr. Peffers: Yes.

Mr. McNaughton: Now, the evidence on the part of the witness Miles will be substantially the same, precisely the same as that of Mr. Thomas. That is also admitted that he would so testify.

The Court: Well, he admits that he would so testify.

VICTORIA W. WELLMAN, called as a witness on behalf of the plaintiff, being first duly sworn, was examined in chief by Mr. McNaughton, and testified as follows:

Q State your full name?
A Victoria W. Wellman.
Q Are you the widow of Harold R. Wellman, deceased?
A I am.
Q Prior to your husband's death where did you reside for about a year or ten months or six months, prior to your husband's death?
A Six months? In Riverside.
149 Q How long did you live in Riverside?
A Eight months.
Q What was your husband's profession?
A Electrical engineer.
Q By whom was he employed at the time of his death and prior to that time?
A The Western Electric Company at Hawthorne.
Q How long had he been in the employ of the Western Electric?
A About a year and a half.
Q How old was he at the time of his death?
A He would have been thirty-four in the following April.
Q When he started out in his profession as an electrical engineer what salary did he earn?
A $1200.
Mr. Peffers: I object to that as to the time.
The Court: Well, the question now is what he was earning at that time probably.
Mr. McNaughton: I had in mind the idea your Honor that it would be competent for the purpose of showing that the deceased was improving constantly in his profession.
The Court: Well, yes, possibly she may answer that.
To which ruling of the court, the defendant, by its counsel, then and there duly excepted.
Mr. McNaughton: A little louder?
A $1200 a year.
Q And what was his salary at the time of his death?
A $3,000 a year.
Q How far was your residence from the Harlem ave-
150 nue station by way of the road?
A I should judge about a half a mile.

Q State whether or not Mr. Wellman was accustomed to travel by way of the road or take some other route when he went from his home to the Harlem avenue station?

A He was accustomed to take the bypath and follow the path to the Harlem station.

Q Now just describe that parth or route that he was accustomed to take?

A He went a distance up beyond the house towards the east of about a block, then struck diagonally through the fields until it came to the other cross street, the first street, followed that directly to the railroad, then a path north of the northbound track to the Harlem station.

Q What train did Mr. Wellman usually take in the morning?

A The 8:09 local that reached Riverside at 8:09.

Q And was it an unusual thing for him to take the 8:41 or 8:40?

A It was.

Q Do you remember the morning of January the 3rd, 1906, when Mr. Wellman left home?

A I do.

Q Do you remember the condition of the atmosphere that morning?

A I do.

Q What was its condition?

A A very dense fog, raining, and a strong wind from the east.

Q Did you on that morning observe Mr. Wellman as he left his home to go to the Harlem avenue station?

A I did.

151 Q When he left his home where did he proceed to go to?

A To the Harlem avenue station.

Q Do you know whether or not he had a commutation ticket?

Mr. Peffers: That is objected to.

Mr. McNaughton: This is not for the purpose of showing he was a passenger, there is no such contention in this case.

Mr. Peffers: Well, then, I don't see any point in asking the question.

Mr. McNaughton: Just connecting it up with the path that he used to take when he went to the station?

The Court: It would be misleading, would tent to show that it gave him some additional rights where he was.

Mr. McNaughton: Well, I admit now your Honor that is not the purpose.

The Court: Well, there can be no different purpose.

Mr. McNaughton. No.

The Court: That I can discover.

Mr. McNaughton: Did you observe him as he proceeded to the station that morning?

A I did.

Q How far did he proceed in your judgment before he disappeared from your view, if he did disappear from your view in the fog?

A About 150 feet.

Q What was Mr. Wellman's condition of health at and prior to the time of his death?

A The best he had ever known.

152 Q Had electrical engineering been his life work?

A It had.

Q Was educated for that purpose?

A He was.

Q How do the tracks of the Burlington road divide the two villages of Berwyn and Riverside, or how did they at that time?

A Very nearly in half.

Q And in Berwyn how is the population divided?

A I think there is, more on the south side of the track.

Q How many crossings across the track of the Burlington between Harlem avenue and Berwyn station?

Mr. Peffers: That is objected to as getting way east of the location.

The Court: I think I will let her answer subject to your objection. She may answer.

A One.

To which ruling of the court, the defendant, by its counsel, then and there duly excepted.

Mr. McNaughton: To what extent is the Harlem avenue crossing used?

A It is used much more than the other crossing.

Q Is there any other crossing over the Chicago & Burlington in the village of Berwyn upon which is operated a surface street railroad?

A Not to my knowledge.

Q There was not at that time?

A No, sir.

of W.

Q With what frequency did street cars at that time pass over the Burlington road on the line of Harlem avenue
153 early in the morning between say seven and nine?

A At an interval of about five minutes.

Q State whether or not a considerable number of passengers took passage at the Harlem avenue station in the morning?

Mr. Peffers: That is objected to.

The Court: Well, she may answer.

To which ruling of the court, the defendant, by its counsel, then and there duly excepted.

A I believe they did.

Mr. McNaughton: Did some of these passengers have occasion to cross the crossing to get to the station?

A I believe so.

Q The Harlem avenue station is on which side of the right of way?

Mr. Peffers: The same objection to all this class of testimony.

The Court: Yes. It was proved that it was on the south side.

Mr. McNaughton: Is it admitted that the Harlem avenue station is on the south side?

Mr. Peffers: No.

Mr. McNaughton: I don't think it is admitted but it is proven here.

The Court: There is no dispute on that point in the evidence here. However if you want it answered let it go.

154 A What is the question?

Mr. McNaughton: On which side of the right of way of the railroad, the north side or the south side is the Harlem station platform?

A On the south side.

Q On which side is the Berwyn station?

A The same.

Q And the Riverside?

A The main station on the south side.

Q Whom did Mr. Wellman leave surviving him as next of kin?

A Myself and my son.

Q What is the boy's name?

A Willie Wellman .

Cross-Examination by Mr. Peffers.

Q Mrs. Wellman, Mr. Wellman was 34 years old, was he not?
A He would have been the following April.
Q In when?
A In April of that year.
Q Yes, April, 1906?
A Yes.
Q You stated I believe that he was in the best of health?
A He was.
Q How large a man was he?
A He was 6 feet 2 inches.
Q How much did he weigh?
A Between 160 and 180.
Q Was his eyesight good?
A To the best of my knowledge it was.
Q And his hearing was also normal?
A Yes, sir.
155 Q You stated in response to Mr. McNaughton's question that he usually took the 8:09 train but sometimes took the 8:41?
A Occasionally.
Q You are unable to state just how often he took the 8:41 but he did take it occasionally?
A Occasionally, not very often.
Q Well, two or three times a week?
A Maybe.
Q Probably more often one week than another?
A No, I don't think so.
Q And you state that you could see Mr. Wellman that morning for about 150 feet away?
A Yes.

Mr. McNaughton: We have some more witnesses on the question of the ringing of the bell, as to one of whom I am at present not fully advised. I was advised by the Clerk that court would adjourn at twelve o'clock, and we had as we expected, more witnesses on hand than we could use. I would like to have the indulgence of the Court until Monday morning.

Mr. Peffers: Maybe I will admit that your witnesses would testify so and so if they were here.

Mr. McNaughton: We would prove by Anton Zopolos that

he was a passenger on a street car which arrived at the crossing as the local pulled in on the morning of January 3rd; that he stood out on the vestibule of the car and that the bell on the express going east on the center track and the whistle were not sounded as the engine approached
156 the crossing; that just as the car pulled up to the crossing and stopped after the local had cleared the crossing east bound, a west bound train passed on the north track.

Mr. Peffers: How far does he say it was from the crossing when the express train came along?

Mr. McNaughton: I could not state as to distance.

Mr. Peffers: I will admit that he would so testify.

Mr. McNaughton: Is it admitted that the Chicago, Burlington & Quincy Railroad owns the road and that it leased it prior to this accident to the Chicago, Burlington & Quincy Railway Company and that the Chicago, Burlington & Quincy Railway Company was operating the road at the time of this accident?

Mr. Peffers. We will admit that the Chicago, Burlington & Quincy Railway Company is the lessee and was operating the road at the time of this accident.

Mr. McNaughton: With that we close.

Plaintiff rests.

Which was all the evidence here offered on the part of the plaintiff.

Whereupon the defendants by their counsel, then and there offered the following written motions and asked the Court to give the following written instructions which said motions and instructions respectively, are in words and figures as follows, to-wit:

157 IN THE CIRCUIT COURT OF UNITED STATES,

Within and for the Northern District of Illinois,

Northern Division.

..... Term, A. D. 1907.

Erastus W. Willard, Administrator of the Estate of Harold R. Wellman, deceased,
Plaintiff.
vs.
Chicago, Burlington & Quincy Railroad Company, and Chicago, Burlington & Quincy Railway Company,
Defendants.

And now comes the above named defendant, Chicago, Burlington & Quincy Railroad Company, by Hopkins, Peffers & Hopkins, its attorneys, at the close of the plaintiff's evidence, and moves the Court to take the case from the jury and to instruct the jury that the plaintiff has failed to make a case in law and that they should find the defendant, Chicago, Burlington & Quincy Railroad Company, not guilty, and submits to the Court the following form of verdict to be given to the jury:

"We, the jury, find the defendant, Chicago, Burlington & Quincy Railroad, not guilty."

HOPKINS, PEFFERS & HOPKINS,
Attorneys for Defendant.

The Court instructs the jury that the plaintiff has failed to make a case in law and you should therefore find the defendant, Chicago, Burlington & Quincy Railroad Com-
158 pany, not guilty, and your verdict should be as follows:

"We, the jury, find the defendant, Chicago, Burlington & Quincy Railroad Company, not guilty."

The Court instructs the jury that the plaintiff has failed to make a case in law on the first additional count to his declaration and as to that count, you should find the defendant, Chicago, Burlington & Quincy Railroad Company, not guilty.

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of

The Court instructs the jury that the plaintiff has failed to make a case in law on the second additional count to his declaration and as to that count, you should find the defendant, Chicago, Burlington & Quincy Railroad Company, not guilty.

The Court instructs the jury that the plaintiff has failed to make a case in law on the third additional count to his declaration and as to that count, you should find the defendant, Chicago, Burlington & Quincy Railroad Company, not guilty.

The Court instructs the jury that the plaintiff has failed to make a case in law on the fourth additional count to his declaration and as to that count, you should find the defendant, Chicago, Burlington & Quincy Railroad Company, not guilty.

The Court instructs the jury that the plaintiff has failed to make a case in law on the fifth additional count to his declaration, and as to that count, you should find the de-
159 fendant, Chicago, Burlington & Quincy Railroad Company, not guilty.

The Court instructs the jury that the plaintiff has failed to make a case in law on the sixth additional count to his declaration and as to that count, you should find the defendant, Chicago, Burlington & Quincy Railroad Company, not guilty.

The Court instructs the jury that the plaintiff has failed to make a case in law on the seventh additional count to his declaration and as to that count, you should find the defendant, Chicago, Burlington & Quincy Railroad Company, not guilty.

The Court instructs the jury that the plaintiff has failed to make a case in law on the eighth additional count to his declaration and as to that count, you should find the defendant, Chicago, Burlington & Quincy Railroad Company, not guilty.

The Court instructs the jury that the plaintiff has failed to make a case in law on the ninth additional count to his declaration and as to that count, you should find the defendant, Chicago, Burlington & Quincy Railroad Company, not guilty.

The Court instructs the jury that the plaintiff has failed to make a case in law upon his original declaration filed herein, and as to such declaration, you should find the defendant,

Chicago, Burlington & Quincy Railroad Company, not guilty.

160 We, the jury, find the defendant, Chicago, Burlington & Quincy Railroad Company, not guilty.

(Endorsed) Filed Jun. 22, 1907, H. S. Stoddard, Clerk.

IN THE CIRCUIT COURT OF UNITED STATES,

Within and for the Northern District of Illinois,

Northern Division.

..... Term, A. D. 1907.

Erastus W. Willard, Administrator of the Estate of Harold R. Wellman, deceased,
Plaintiff.

vs.

Chicago, Burlington & Quincy Railroad Company, and Chicago, Burlington & Quincy Railway Company,
Defendants.

And now comes the above named defendant, Chicago, Burlington & Quincy Railway Company, by Hopkins, Peffers & Hopkins, its attorneys, at the close of the plaintiff's evidence, and moves the Court to take the case from the jury and to instruct the jury that the plaintiff has failed to make a case in law and that they should find the defendant, Chicago, Burlington & Quincy Railway Company, not guilty, and submits to the Court the following form of verdict to be given to the jury:

161 "We, the jury, find the defendant, Chicago, Burlington & Quincy Railway, not guilty."

HOPKINS, PEFFERS & HOPKINS,
Attorneys for Defendant.

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of

The Court instructs the jury that the plaintiff has failed to make a case in law and you should therefore find the defendant, Chicago, Burlington & Quincy Railway Company, not guilty, and your verdict should be as follows:

"We, the jury, find the defendant, Chicago, Burlington & Quincy Railway Company, not guilty."

The Court instructs the jury that the plaintiff has failed to make a case in law on the first additional count to his declaration and as to that count, you should find the defendant, Chicago, Burlington & Quincy Railway Company, not guilty.

The Court instructs the jury that the plaintiff has failed to make a case in law on the second additional count to his declaration and as to that count, you should find the defendant, Chicago, Burlington & Quincy Railway Company, not guilty.

The Court instructs the jury that the plaintiff has failed to make a case in law on the third additional count to his declaration and as to that count, you should find the defendant, Chicago, Burlington & Quincy Railway Company, not guilty.

The Court instructs the jury that the plaintiff has failed to make a case in law on the fourth additional count to his
162 declaration and as to that count, you should find the defendant, Chicago, Burlington & Quincy Railway Company, not guilty.

The Court instructs the jury that the plaintiff has failed to make a case in law on the fifth additional count to his declaration and as to that count, you should find the defendant, Chicago, Burlington & Quincy Railway Company, not guilty.

The Court instructs the jury that the plaintiff has failed to make a case in law on the sixth additional count to his declaration and as to that count, you should find the defendant, Chicago, Burlington & Quincy Railway Company, not guilty.

The Court instructs the jury that the plaintiff has failed to make a case in law on the seventh additional count to his declaration and as to that count, you should find the defendant, Chicago, Burlington & Quincy Railway Company, not guilty.

The Court instructs the jury that the plaintiff has failed to make a case in law on the eighth additional count to his declaration and as to that count, you should find the defendant, Chicago, Burlington & Quincy Railway Company, not guilty.

The Court instructs the jury that the plaintiff has failed to make a case in law on the ninth additional count to his declaration and as to that count, you should find the defend-
163 ant, Chicago, Burlington & Quincy Railway Company, not guilty.

The Court instructs the jury that the plaintiff has failed to make a case in law upon his original declaration filed herein, and as to such declaration, you should find the defendant, Chicago, Burlington & Quincy Railway Company, not guilty.

We, the jury, find the defendant, Chicago, Burlington & Quincy Railway Company, not guilty.

(Endorsed) Filed Jun. 22, 1907, H. S. Stoddard, Clerk.

Which said motions were endorsed "Filed June 22, 1907, H. S. Stoddard, Clerk"

And thereupon Court adjourned until June 24th, 1907 at 10 o'clock A. M.

June 24th, 1907, 10 o'clock A. M. Court opened pursuant to adjournment.

Whereupon after hearing the arguments of counsel upon the several motions of the defendants to find a verdict of not guilty, the Court, in passing upon and deciding said motion, said as follows:

164 The Court: The evidence in this case is undisputed that the deceased traveled a distance on the right of way of the railroad between the tracks; that he had an umbrella hoisted. He was in a hurry I suppose to catch a train, and as soon as he reached Harlem avenue he lowered the umbrella and run in front of this train and was struck. If he had used his faculties at all he would have discovered it, because he was at a safe distance when he lowered the umbrella. At that time the train was in sight to anybody that looked. There was no obstruction there. Even the smoke and fog did not hide the train from those that looked. He did not look. He did not listen, or he would have heard the train, for others heard it. The conductor of the street car endeavored to warn him, shouted to him, but he didn't hear. He was so intent on reaching his own train that he did not look; he did not listen; he did not heed what he did hear. He was familiar with that crossing there. The street car had approached the crossing and stopped. They saw the train and were waiting for it to pass by. Had he taken in the situation, had he used his eyes and ears and faculties and reasoning, intelligence, which he did not do, he would not be hurt. That failure to use the ordinary faculties that nature has provided a man with, was the cause of his death. Just why he did not is not necessary to explain. I cannot tell. There can be only one ver-

dict in this case and that is the one that I direct for the defendant. I will appoint the gentleman on the corner as foreman to sign the verdict.

Mr. McNaughton: I desire to except to the action of
165 the court in directing a verdict for the defendants, this record presents a question of fact which should be submitted to the jury.

The Court: Of course that you are entitled to.

To which action of the Court in charging the jury as aforesaid to find for the defendants the plaintiff by his counsel then and there duly excepted.

And thereupon the jury returned the following verdict: "We, the jury, find the defendants not guilty."

Whereupon counsel for plaintiff moved the Court to grant a new trial of said cause and filed a motion in writing, which is in the words and figures, following:

new United States of America,
Northern District of Illinois,
Northern Division.

In the United States Circuit Court,

In and for the Northern District of Illinois,

Northern Division.

Erastus W. Willard, Administrator of the Estate of Harold R. Wellman, deceased, *vs.* The Chicago, Burlington & Quincy Railway Company and the Chicago, Burlington & Quincy Railroad Company.	Motion for New Trial.

166 And now comes the plaintiff, Erustus W. Willard, administrator of the estate of Harold R. Wellman, deceased, by Donahoe, McNaughton & McKeown, his attorneys, and moves the Court to set aside the verdict heretofore entered and grant a new trial in the above entitled cause, for the following reasons:

First: The Court erred in refusing to permit the plaintiff to prove on the trial of said cause, the physical condition at

the Harlem Avenue crossing of the Chicago, Burlington & Quincy Railroad Company.

Second: The Court erred in refusing to permit the plaintiff to prove the number of highway crossing open for use in the village of Berwyn.

Third: The Court erred in refusing to permit the plaintiff to prove that within a distance of three-quarters of a mile between Harlem Avenue Station on the line of the Chicago, Burlington & Quincy Railroad Company, the defendants maintained but one crossing.

Fourth: The Court erred in refusing to permit the plaintiff to prove to what extent Harlem Avenue, at the point where the same is intersected by the railroad of defendants, was used by the public.

Fifth: The Court erred in refusing to permit the plaintiff to prove to what extent the railroad Company used its right of way and tracks where the same intersected Harlem Avenue.

Sixth: The Court erred in refusing to permit the plain-
167 tiff to submit to the jury, other evidence, material and competent to be considered by it in the determination of the questions of fact at issue.

Seventh: The Court erred in sustaining the motion to exclude the evidence from the jury at the close of the plaintiff's case.

Eighth: The Court erred in directing the jury to find for the defendants.

Ninth: The Court erred in holding, as a matter of law, that deceased, Harold R. Wellman, in attempting to cross the right of way and tracks of the defendants on the third day of January, 1906, was guilty of contributory negligence.

Tenth: The Court erred in instructing the jury to find for the defendants.

Eleventh: The verdict is contrary to the law.

Twelfth: The verdict is contrary to the evidence.

Thirteenth: And for other reasons.

DONAHOE, MCNAUGHTON & MCKEOWN,
Plaintiff's Attorney.

Whereupon the Court overruled said motion for a new trial and entered judgment upon the verdict in favor of the said defendants, against the said plaintiff.

168. To which ruling of the Court in overruling said motion and in entering said judgment, plaintiff, by his counsel, then and there duly excepted.

Thereupon, plaintiff, by his counsel, prayed for leave to file a bill of exceptions, which was granted and the time for filing the same was limited to sixty days, next after July 9th, 1907.

of Northern District of Illinois,
United States of America,
Northern Division.

IN THE UNITED STATES CIRCUIT COURT,

In and for the Northern District of Illinois,

Northern Division.

Erastus W. Willard, Administrator of the Estate of Harold R. Wellman, deceased,
vs.
The Chicago, Burlington & Quincy Railway Company and the Chicago, Burlington & Quincy Railroad Company.

I, Francis M. Wright, Judge of the Circuit Court of the United States in and for the Northern District of Illi-
169 nois, before whom the above entitled cause of Erastus W. Willard, administrator of the estate of Harold R. Wellman, deceased, plaintiff, vs. the Chicago, Burlington & Quincy Railway Company and the Chicago, Burlington & Quincy Railroad Company, defendants, was tried, do hereby settle the foregoing, as and for the bill of exceptions therein, and do hereby certify that the foregoing bill of exceptions contains all the evidence offered by either party on the trial of said cause, and all other proceedings had and taken thereon material or in any way relevant to the rulings of the Court made upon said trial or to the objections and exceptions made and taken by the respective parties upon said trial, which said rulings, objections and exceptions are in this said bill of exceptions shown and made manifest, and do hereby make the same matter of record in said cause.

In witness whereof, I have hereunto set my hand and seal this 31st day of August, 1907.

FRANCIS M. WRIGHT, (Seal)
Judge.

O.K.
HOPKINS, PEFFER & HOPKINS,
O.K.
DONAHOE, MCNAUGHTON & MCKEOWN.

(Endorsed) Filed Sep 4, 1907 H. S. Stoddard, Clerk

170 And afterwards to-wit, on the fourth day of November, 1907, come the plaintiff in said entitled cause by his attorneys and filed in the clerk's office of said court his certain Petition for Writ of Error, in words and figures following to-wit:

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171 PETITION FOR WRIT OF ERROR.

IN THE CIRCUIT COURT OF THE UNITED STATES.

Within and for the Northern District of Illinois,

Eastern Division.

.....Term, A. D. 1907.

Erastus W. Willard, Administrator of the Estate of Harold R. Wellman, deceased,
Plaintiff.
vs.
The Chicago, Burlington & Quincy Railroad Company and the Chicago, Burlington & Quincy Railway Company.
Defendants.
} Petition for Writ of Error.

And now comes the above named plaintiff by Donahoe, McNaughton & McKeown, his attorneys, and shows to the Court here that on the 9th day of July, A. D. 1907, the above named Court entered judgment in the above entitled cause in favor of the above named defendants, and against said plaintiff, in which judgment and in the proceedings in said action, prior

writ filed 1907.

thereunto, certain grievous errors were committed and happened to the great damage and prejudice of said plaintiff; all of which errors, more in detail, appear in the assignment of errors filed with this petition.

Wherefore said plaintiff prays that a writ of error may be issued in his behalf, as administrator, to remove the record and proceedings and all things, concerning the same, as well as the bill of exceptions in the above entitled cause, to the United States Circuit Court of Appeals for the seventh circuit, for the correction of the errors so complained of and the reversal of said judgment therein mentioned, and
172 that a transcript of such record, proceedings and all things concerning the same, and the bill of exceptions in this cause, duly authenticated, may be transmitted to said United States Circuit Court of Appeals for the seventh circuit.

DONAHOE, MCNAUGHTON & MCKEOWN,
Attorneys for said Administrator.

(Endorsed) Filed Nov. 4, 1907, H. S. Stoddard, Clerk.

173 And on the same day to-wit, the fourth day of November, 1907, come the plaintiff in said entitled cause by his attorneys and filed in the clerk's office of said court his certain Assignment of Errors in words and figures following to-wit:

ASSIGNMENT OF ERRORS.

IN THE CIRCUIT COURT OF UNITED STATES,

Within and for the Northern District of Illinois,

Eastern Division.

..... Term, A. D. 1907.

Erastus W. Willard, Administrator of the Estate of Harold R. Wellman, deceased,

Plaintiff.

vs.

Chicago, Burlington & Quincy Railroad Company, and Chicago, Burlington & Quincy Railway Company,

Defendants.

And now comes the plaintiff in the above entitled cause by Donahoe, McNaughton & McKeown, his attorneys, and says that in the record and proceedings and in the verdict and judgment in said cause, which said judgment was entered on, to-wit: July 9th, A. D. 1907, there is manifest error inasmuch as:

First: The Court erred in sustaining the objections of counsel for the defendants to the introduction of the following testimony of the witness, Dwight L. Kammerer, offered by plaintiff:

Mr. McNaughton: Do you know with what frequency, the street cars ran over the Burlington on the line of Harlem avenue on January 3, 1906 and prior to that time?

Second: The Court erred in sustaining the objection of defendants to the introduction of the following testimony of the witness, John E. Sullivan, offered by the plaintiff:

Q On January 3, 1906, with what frequency did street cars pass over the Burlington crossing on Harlem avenue?

175 Third: The Court erred in sustaining the objection of defendants to the introduction of the following testimony of the witness, John E. Sullivan, offered by the plaintiff:

Q To what extent was Harlem avenue at the intersection with the Burlington road used by pedestrians, people driving in vehicles and people in street cars?

Fourth: The Court erred in sustaining the objection of defendants to the introduction of the following testimony of the witness, William M. Motter, offered by the plaintiff:

Q Approximately what was the population of Berwyn on the 3rd of January, 1906, and prior to that time?

Fifth: The Court erred in sustaining the objection of the defendants to the introduction of the following testimony of the witness, William M. Motter, offered by the plaintiff:

Q Approximately what was the population of Riverside on and prior to January 3, 1906?

Sixth: The Court erred in sustaining the objection of the defendants to the introduction of the following testimony of the witness, William M. Motter, offered by the plaintiff:

Q How many crossings are there crossing Burlington road between Harlem avenue and Berwyn station?

Seventh: The Court erred in sustaining the objection of the defendants to the introduction of the following testimony of the witness, James Lane, offered by the plaintiff:

Q How far east did it (the express train which struck 176 Wellman) run before it was stopped

A About five blocks, I should judge.

Q How many feet in the blocks, would you estimate?

Eighth: The Court erred in sustaining the motions of the defendants at the close of all the evidence offered by the plaintiff, to instruct the jury to find the defendants not guilty, which motions were as follows, to-wit:

And now comes the above named defendant, Chicago, Burlington & Quincy Railroad Company, by Hopkins, Peffers & Hopkins, its attorneys, at the close of the plaintiff's evidence, and moves the Court to take the case from the jury and to instruct the jury that the plaintiff has failed to make a case in law and that they should find the defendant, Chicago, Burlington & Quincy Railroad Company not guilty, and submits to the Court the following form of verdict to be given to the jury:

"We, the jury, find the defendant, Chicago, Burlington & Quincy Railroad, not guilty."

HOPKINS, PEFFERS & HOPKINS,
Attorneys for Defendant.

And now comes the above named defendant, Chicago, Burlington & Quincy Railway Company, by Hopkins, Peffers & Hopkins, its attorneys, at the close of the plaintiff's evidence, and moves the Court to take the case from the jury and to instruct the jury that the plaintiff has failed to make a case in law and that they should find the defendant, Chicago, Burlington & Quincy Railway Company, not guilty, and sub-
177 mits to the Court the following form of verdict to be given to the jury:

"We, the jury, find the defendant, Chicago, Burlington & Quincy Railway, not guilty."

HOPKINS, PEFFERS & HOPKINS,
Attorneys for Defendant.

Ninth: The Court erred in giving the following charge to the jury:

The Court: The evidence in this case is undisputed that the deceased traveled a distance on the right of way of the railroad between the tracks; that he had an umbrella hoisted. He was in a hurry I suppose to catch a train, and as soon as he reached Harlem avenue he lowered the umbrella and ran in front of this train and was struck. If he had used his faculties at all he would have discovered it, because he was at a safe distance when he lowered the umbrella. At that time the train was in sight to anybody that looked. There was no obstruction there. Even the smoke and fog did not hide the train from those that looked. He did not look. He did not listen, or he would have heard the train, for others heard it. The conductor of the street car endeavored to warn him, shouted to him, but he didn't hear. He was so intent on reaching his own train that he did not look; he did not listen; he did not heed what he did hear. He was familiar with that crossing there. The street car had approached the crossing and stopped. They saw the train and were waiting for it to pass by. Had he taken in the situation, had he used his eyes and ears and faculties and reasoning, intelligence,
178 which he did not do, he would not be hurt. That failure to use the ordinary faculties that nature has provided a man with, was the cause of his death. Just why he did not is not necessary to explain. I cannot tell. There can be only one verdict in this case and tha tis the one that I direct for the defendant. I will appoint the gentleman on the corner as foreman to sign the verdict.

Tenth: The Court erred in overruling plaintiff's motion for a new trial.

Eleventh: The Court erred in entering judgment for the defendants upon the verdict.

Wherefore the said plaintiff prays that said judgment may be reversed and said cause remanded to the Trial Court for a new trial.

DONAHOE, MCNAUGHTON & MCKEOWN,
Attorneys for said Plaintiff.

(Endorsed) Filed Nov. 4, 1904, H. S. Stoddard, Clerk.

179 And on the same day to-wit, the fourth day of November, being one of the days of the regular July term of said Court, 1907, in the record of proceedings thereof in said entitled cause before the Hon. S. H. Bethea, District Judge, appears the following entry to-wit:

ORDER OF NOVEMBER 4, 1907, ALLOWING WRIT OF ERROR.

Erastus W. Willard, Administrator of the Estate of Harold R. Wellman, deceased,
vs.
Chicago, Burlington and Quincy Railroad Company and Chicago, Burlington and Quincy Railway Company,
} 28523

Upon motion of the plaintiff's attorney and upon filing the petition for writ of error, together with assignment of errors and bond in the sum of two hundred and fifty dollars which is approved and ordered to be filed;

It is thereupon Ordered that a writ of error be and the same is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Seventh Judicial Circuit, the Judgment entered herein on the ninth day of July, 1907, and that a citation issue returnable within thirty days from this date.

180 And on the same day to-wit; the fourth day of November, 1907, come Erastus W. Willard, administrator of the estate of Harold R. Wellman, deceased, as principal and the United States Fidelity and Guaranty Company of Baltimore, Maryland, as surety and filed in the Clerk's office of said Court a certain Bond on writ of error in words and figures following to-wit:

Bond on writ of error.

BOND ON WRIT OF ERROR.

Know All Men by These Presents, That we, Erastus W. Willard, administrator of the estate of Harold R. Wellman, deceased, as principal, and the United States Fidelity and Guaranty Company, of Baltimore, Maryland, as surety, are held and firmly bound unto the Chicago, Burlington & Quincy Railroad Company, and the Chicago, Burlington & Quincy Railway Company, in the full and just sum of two hundred fifty ($250.00) dollars, to be paid to the said Chicago, Burlington & Quincy Railroad Company and the said Chicago, Burlington & Quincy Railway Company, its certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, successors, executors and administrators, jointly and severally by these presents.

Sealed with our seals, this 28th day of October, A. D. 1907.

Whereas, lately at a term of Court held at Chicago, Illinois, in the Circuit Court of the United States for the Northern District of Illinois, Northern Division, in a suit pending in said Court between Erastus W. Willard, administrator of the estate of Harold R. Wellman, deceased, as plaintiff,

181 and the Chicago, Burlington & Quincy Railroad Company and the Chicago, Burlington & Quincy Railway Company, as defendants, a judgment was rendered against the said Erastus W. Willard, administrator, as aforesaid, for the costs of said suit, and the said Erastus W. Willard, administrator, as aforesaid, having obtained an order, and filed a copy thereof in the Clerk's office of the said Court, to reverse the Judgment in the aforesaid suit, and a citation directed to the said Chicago, Burlington & Quincy Railroad Company and the Chicago, Burlington & Quincy Railway Company, citing and admonishing them and each of them to be and appear at a United States Court of Appeals for the Seventh Circuit, to

it of Nov. be holden at Chicago, within thirty (30) days from the date hereof.

Now the condition of the above obligation is such, that if the said Erastus W. Willard, administrator, as aforesaid, shall prosecute his appeal with effect and pay all damages and costs, if he fail to make his plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

ERASTUS W. WILLARD, (Seal)

(Seal) THE UNITED STATES FIDELITY & GUARANTY CO.
By CHAS. O. SCULL,
Vice President.

Attest:
ALBERT H. BUCK,
Asst. Secretary.

Ap. S. H. B.

182 State of Maryland, }
City of Baltimore. } ss.

On this 28th day of October, 1907, before me appears Chas. O. Scull, vice president of The United States Fidelity and Guaranty Company, of Baltimore City, Maryland, with whom I am personally acquainted, who being by me duly sworn, says that he is vice president of The United States Fidelity and Guaranty Company; that he knows the corporate seal of the Company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed by the order of the Board of Directors of said Company; that he signed said instrument as vice president of said Company by like authority. The said Chas. O. Scull further says that he is acquainted with Albert H. Buck, and knows him to be the Asst. Secretary of the said The United States Fidelity and Guaranty Company; that the signature of the said Albert H. Buck subscribed to the said instrument is the genuine handwriting of the said Albert H. Buck and was thereto subscribed by like order of the said Board of Directors.

My commission expires first Monday in May, 1908.

A. D. PATRICK,
(Seal) *Notary Public.*

(Endorsed) Filed Nov. 4, 1907, H. S. Stoddard, Clerk.

186 United States of America, } ss:

The President of the United States, To the Honorable the Judges of the Circuit Court of the United States, for the Northern District of Illinois, Greeting:

Writ filed 1907

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, or some of you, between Erastus W. Willard, Administrator of the Estate of Harold R. Wellman, deceased, and Chicago, Burlington & Quincy Railroad Company and Chicago, Burlington & Quincy Railway Company, a manifest error hath happened, to the great damage of the said Erastus W. Willard, Administrator of the Estate of Harold R. Wellman, deceased, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Seventh Circuit, together with this writ, so that you have the same in the said United States Circuit Court of Appeals for the Seventh Circuit at Chicago, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Seventh Circuit may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the Fourth day of November, in the year of our Lord one thousand nine hundred and seven.

H S STODDARD

(Seal) *Clerk of the Circuit Court of the United States for the Northern Dist. of Illinois.*

Allowed by
S. H. BETHEA
Judge.

Northern District of Illinois, } ss:

writ, . 4,

In obedience to the within writ I herewith transmit to the United States Circuit Court of Appeals for the Seventh Circuit, a true and complete transcript of the record and proceedings in the foregoing entitled cause this 11th day of November A. D. 1907.

H. S. STODDARD
Clerk United States Circuit Court,
Northern District of Illinois.

(Seal)

(Endorsed) Writ of Error. Filed Nov 4, 1907 H. S. Stoddard Clerk

r tran- ed 1907.

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PRAECIPE

IN THE CIRCUIT COURT OF UNITED STATES,

Within and for the Northern District of Illinois,

Eastern Division.

Term, A. D. 1907.

Erastus W. Willard, Administrator of the estate of Harold R. Wellman, deceased,
Plaintiff,

vs.

Chicago, Burlington & Quincy Railroad Company and Chicago, Burlington & Quincy Railway Company,
Defendants,

To the Clerk of said Court:

You will please prepare transcript of the record in the above entitled cause, to be filed in the office of the clerk in the United States Circuit Court of Appeals for the Seventh Circuit, pursuant to the writ of error heretofore allowed, and include in said transcript the following pleadings, proceedings, orders, papers and documents on file or of record, to-wit:

Transcript of the record from the City Court of Aurora, Kane County, Illinois. Praecipe scripsit Nov.

Order of December 26th, 1906, granting plaintiff leave to file additional counts and ruling defendants to plead.

Additional Counts filed December 26th, 1906.

Plea of the defendants filed January 3rd, 1907.

Order of June 21st, 1907.

Order of June 22nd, 1907.

184 Order of June 24th, 1907.

Motion for new trial filed June 29th, 1907.

Judgment of July 9th, 1907.

Bill of Exceptions.

Petition for writ of error and assignment of errors.

Order of November 4th, 1907, allowing writ of error.

Bond on writ of error.

Said transcript to be prepared as required by law and the rules of this Court, and the rules of the United States Circuit Court of Appeals for the Seventh Circuit, before the 1st day of December, A. D. 1907.

DONAHOE, MCNAUGHTON & MCKEOWN,
Attorneys for Plaintiff in Error.

(Endorsed) Filed Nov., 4, 1907, H. S. Stoddard, Clerk.

185 Northern District of Illinois, } ss
Eastern Division. }

I, H. S. Stoddard, Clerk of the Circuit Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record in said Court made in accordance with the Praecipe filed in the cause entitled Erastus W. Willard, Administrator of the estate of Harold R. Wellman, deceased, Plaintiff vs. Chicago, Burlington and Quincy Railroad Company and Chicago, Burlington and Quincy Railway Company, Defendants, as the same appear from the original records and files of said court now remaining in my custody and control. Certificate of clerk.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in the City of Chicago, in said District, this 11th day of November, 1907.

H. S. STODDARD,
Clerk.

(Seal)

187 United States of America. } ss.

led 1907. *The President of the United States, to Chicago, Burlington & Quincy Railroad Company and Chicago, Burlington & Quincy Railway Company, Greeting:*

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Seventh Circuit, to be held at Chicago in the Federal Building, corner of Jackson and Dearborn streets, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States for the Northern District of Illinois, Northern Division, wherein Erastus W. Willard, administrator of the estate of Harold R. Wellman, deceased, was plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable S. H. Bethea, Judge of the Circuit Court of the United States for the Northern District of Illinois, Northern Division, this 4th day of November, A. D. 1907.

S. H. BETHEA.

We hereby accept service of the within citation, this 6th day of November, A. D. 1907 on behalf of the Chicago, Burlington & Quincy Railroad Company, and Chicago, Burlington & Quincy Railway Company, the defendants in said cause.

HOPKINS, PEFFERS & HOPKINS,
Attorneys for Defendants in Error.

(Endorsed) Citation. Filed Nov 7—1907 H. S. Stoddard, Clerk .

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 140, inclusive, contain a true copy of the printed record, printed under my supervision, and filed December 14, 1907, on which this cause was argued, heard and determined in the case of Erastus W. Willard, Administrator of the Estate of Harold R. Wellman, deceased.

vs.

Chicago, Burlington & Quincy Railroad Company and Chicago Burlington & Quincy Railway Company.

No. 1426, October Term, 1907, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this ninth day of November A. D. 1908.

EDWARD M. HOLLOWAY

(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

1 TRANSCRIPT OF RECORD OF CIRCUIT COURT OF APPEALS

At a regular term of the United States Circuit Court of Appeals begun and held at the United States Court rooms in the City of Chicago in said Seventh Circuit on the first day of October, A. D. nineteen hundred and seven of the October Term in the year of our Lord, One thousand nine hundred and seven, and of our Independence the one hundred and thirty second.

And afterwards, to-wit: On the eleventh day of November, A. D. 1907, in the October Term last aforesaid, came the Plaintiff in Error, by his counsel, Mr. John T. Donahoe, Mr. Coll McNaughton, and Mr. James A. McKeown, and filed in the office of the clerk of this Court, their appearances which are in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term, 1907.

No. 1426.

Erastus W. Willard, Administrator, etc.
Plaintiff in Error
vs.
Chicago, Burlington & Quincy R. R. Co. *et al.*

The Clerk will enter my appearance as Counsel for the Plaintiff in Error.

JOHN T. DONAHOE
COLL MCNAUGHTON
JAMES A. MCKEOWN
Joliet, Ill.

Endorsed: Filed Nov. 11, 1907. Edward M. Holloway, Clerk.

And afterwards, to-wit: On the sixteenth day of December, A. D. 1907, in the October Term last aforesaid, came
2 the Defendant in Error, by its counsel, Mr. Albert J. Hopkins, Mr. David J. Peffers, and Mr. James S. Hopkins, and filed in the office of the clerk of this Court their appearances, which are in the words and figures following, to-wit:—

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term, 1907.

No. 1426.

Erastus W. Willard, Admr.
Plaintiff in Error
vs
Chicago, Burlington & Quincy R. R. Co.

The Clerk will enter my appearance as counsel for the Defendant in Error.

A. J. HOPKINS
DAVID J. PEFFERS
JAMES S. HOPKINS.

(Endorsed: Filed Dec. 16, 1907. Edward M. Holloway, Clerk.

And afterwards, to-wit: On the fourteenth day of April, A. D. 1908, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Tuesday, April 14, 1908.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:
Hon. Francis E. Baker, Circuit Judge presiding.
Hon. Christian C. Kohlsaat, Circuit Judge
Edward M. Holloway, Clerk
Luman T. Hoy, Marshal.

Before:
Hon. Francis E. Baker, Circuit Judge
Hon. Christian C. Kohlsaat, Circuit Judge

3 Erastus W. Willard, Administrator
1426 *vs*
Chicago, Burlington & Quincy Railroad Company.
} Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that this cause be, and the same is hereby set down for hearing April 28, 1908.

And afterwards, to-wit: On the twenty-eight day of April, A. D. 1908, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Tuesday, April 28, 1908.

Court met pursuant to adjournment and was opened by proclamation of crier.
Present:
Hon. Peter S. Grosscup, Circuit Judge, presiding
Hon. Francis E. Baker, Circuit Judge
Hon. William H. Seaman, Circuit Judge
Edward M. Holloway, Clerk
Luman T. Hoy, Marshal.

Erastus W. Willard, Administrator
1426 *vs*
Chicago, Burlington & Quincy Railway Company
} Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral argument by Mr. Coll McNaughton, counsel for plaintiff in error and by Mr. David J. Peffers, counsel for defendant in error, and the Court having heard the same takes this matter under advisement.

4 At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United States Court Room, in the City of Chicago, in said Seventh Circuit, on the sixth day of October, one thousand nine hundred and eight of the October Term, in the year of our Lord one thousand nine hundred and eight, and of our Independence the one hundred and thirty-third year.

And on the same day, to-wit: On the sixth day of October, A. D. 1908, in the October Term last aforesaid, there was filed in the office of the clerk of this Court, the opinion of the Court in this cause, which opinion is in the words and figures following, to-wit:

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5 IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 1426.

October Term, 1907. April Session, 1908.

Erastus W. Willard, Administrator of the Estate of Harold R. Wellman, Deceased,
Plaintiff in Error.
vs.
Chicago, Burlington & Quincy Railroad Company and Chicago, Burlington & Quincy Railway Company.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

Before Grosscup, Baker & Seaman, Circuit Judges.

The plaintiff in error, as administrator of the estate of Harold R. Wellman, was the plaintiff below in this action, brought in the City Court of Aurora, Illinois, to recover of the defendant corporations, for alleged joint negligence in the operation of their railroad in Illinois, causing the death of the intestate; and the declaration filed in that court expressly charges such defendants with joint liability, in a plea of trespass on the case. Application for removal of the suit to the federal court was made on behalf of the defendant Chicago, Burlington & Quincy Railway Company, as an Iowa corporation, and its petition avers (in substance), that the controversy was "wholly between citizens of different states"; that the defendant Chicago, Burlington & Quincy Railroad Company was an Illinois corporation, owning the railroad in question prior to 1901, when it leased to the petitioner all its property and all rights "except the lessor's franchse to be

a corporation"; that the petitioner has ever since oper-
6 ated and managed such railroad, with no possession or use thereof in the lessor defendant; and that such lessor corporation "was fraudulently and improperly joined as a party defendant in this cause for the sole purpose of defeating the right" of removal thereof to the federal court. The cause was then removed to the trial court; motion was made by the plaintiff to remand, but was subsequently withdrawn; and the plaintiff then filed additional counts to the declaration, averring in each, the relation of the defendants, respectively, as lessor and lessee of the railroad, operation thereof by the lessee corporation and negligent acts on the part of such lessee causing the injury in suit. On plea of the general issue, the trial proceeded, resulting in direction of verdict for the defendants and judgment accordingly, with this writ of error prosecuted by the plaintiff to reverse such judgment.

Seaman, Circuit Judge, delivered the opinion of the court:

On this writ of error the fundamental question arises, whether the trial court obtained jurisdiction of the cause, as brought from the state court, on petition and order for removal to the federal court; and such inquiry cannot be set aside to examine the contentions upon the merits, in reference to the direction of a verdict in favor of each defendant, at the conclusion of the plaintiff's testimony. The case was removed under a declaration in trespass, which distinctly charges the two defendant corporations with joint negligence and joint liability, in causing the death of the intestate; and on petition of one of the defendants, as a foreign corporation, averring that it was the lessee of the other defendant (Illinois corporation), in the exclusive use and operation of the railroad and alone liable for the alleged injury, if liability arose, and that the resident corporation "was fraudulently and improperly joined as a party defendant." With no evidence of record in the state court, aside from these pleadings, we are of opinion, that jurisdiction for trial of the controversy, as one "wholly between citizens of different states," within the Removal Act of 1875 (18 Stat. 470) and amendments (1 U. S. Comp. St. p. 509), was not acquired by the trial court. Jurisdiction of such cases in the federal court is strictly limited to the statutory ground, and rests solely on the state of facts and controversy of record, as brought from the court of original cognizance, so that the rule is in-

flexible, that acquiescence of the parties (M. C. & L. M.
7 Ry. Co. v. Swan, 111 U. S. 379, 382), failure to press motion to remand, or other proceedings in the federal court, after removal, are without force to enlarge the statutory authority of the federal court in causes so brought. Alabama Southern Ry. v. Thompson, 200 U. S. 206, 213 and cases reviewed; Offner v. Chicago & E. R. Co., 148 Fed. 201, 202.

The right of the plaintiff in indisputable, to sue the defendants in the state court—averring their joint liability, if so advised—and to have adjudication upon such claim, in that forum, unless due cause for removal to the federal court is there established; and such right is neither lost by an unauthorized removal, nor abandoned by the plaintiff's procedure thereafter in the federal court, through amended declaration or otherwise, to make the best of the condition thus arising. Whether removal is ordered or denied in the state court, does not settle the subsequent jurisdiction, which rests on the state of facts there exhibited and not upon the ruling of the court; with federal cause for removal established by the petitioner, jurisdiction is transferred ipso facto, while failing such evidence jurisdiction remains in the state court, irrespective of any order there entered. The cause presented in the state court by the declaration was joint, expressly charging joint negligence and liability—plainly tendering no issue of several negligence and not provable for several liability—so that the controversy was not removable on such election of plea, in the absence of unmistakable proof of bad faith in the joinder, as a fraud upon the court and parties. In reference to the averment of fraudulent joinder, contained in the petition for removal, it is sufficient to remark, that no facts are stated in its support, and the mere deduction or legal conclusion of the pleader so stated, under the well settled rules of pleading (Fogg v. Blair, 139 U. S. 118, 127), is without force unless proven. This averment, however, is not only unsupported by facts, but the good faith of the plaintiff, in such joinder of the lessor corporation, is fully vindicated by the conceded fact of an established rule in Illinois which authorizes joinder and joint recovery, under such circumstances, in the state forum. See Chicago & G. T. Ry. Co., 209 Ill., 414, 70 N. E. 654. That the general doctrine is otherwise—that joint recovery against a lessor, under the conditions stated in the petition, is denied in the federal courts, by numerous authorities cited in opposition—cannot debar the plaintiff of his right of action (and such benefit

as the local rule may afford) in the state court, nor au-
8 thorize removal of his suit under the federal statutes, as above construed by the ultimate tribunal.

For want of jurisdiction in the trial court, therefore, under the removal proceedings, the judgment is reversed, and the cause remanded to the Circuit Court of the United States for the Northern District of Illinois, with direction to remand the same to the City Court of Aurora, Kane County, Illinois.

A true Copy.
Teste:

.....
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

9 And on the same day, to-wit: On the sixth day of October, A. D. 1908, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Tuesday, October 6, 1908.

Present:
Hon. Peter S. Grosscup, Circuit Judge, presiding
Hon. Francis E. Baker, Circuit Judge
Hon. William H. Seaman, Circuit Judge
Edward M. Holloway, Clerk
Luman T. Hoy, Marshal.

Erastus W. Willard, Administrator of the Estate of Harold R. Wellman, deceased.
vs
Chicago, Burlington & Quincy Railroad Company and Chicago, Burlington & Quincy Railway Company.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of Illinois, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Circuit Court in this cause, be, and the same is hereby reversed with costs, and that this cause be and the same is hereby remanded to the said Circuit Court with direction to remand the same to the City Court of Aurora, Kane County, Illinois.

10 UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from 1 to 9, inclusive, contain a true copy of the proceedings had and papers filed, except the briefs of counsel in the case of

Erastus W. Willard, Administrator, etc.

vs.

Chicago, Burlington & Quincy Railroad Company, *et al.*

No. 1426, October Term, 1907, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this ninth day of November A. D. 1908.

EDWARD M. HOLLOWAY,

(Seal.) *Clerk of the United States Circuit Court of Appeals For the Seventh Circuit.*

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Seventh Circuit, Greeting:

Being informed that there is now pending before you a suit in which Erastus W. Willard, Administrator of the estate of Harold R. Wellman, deceased, is plaintiff in error, and Chicago, Burlington & Quincy Railroad Company and Chicago, Burlington & Quincy Railway Company are defendants in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the Northern District of Illinois, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 8th day of December, in the year of our Lord one thousand nine hundred and eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 21,423. Supreme Court of the United States. No. 627, October Term, 1908. Chicago, Burlington & Quincy Ry. Co. vs. Erastus W. Willard, Adm'r, &c. Writ of Certiorari.

Return to Writ.

UNITED STATES OF AMERICA,
Seventh Circuit, ss:

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of Erastus W. Willard, Administrator of the Estate of Harold R. Wellman, deceased, Plaintiff in Error, vs. Chicago, Burlington & Quincy Railroad Company and Chicago, Burlington & Quincy Railway Company, Defendant- in Error, No. 1426, is a full, true and complete transcript with all the pleadings, proceedings and record entries in said cause as mentioned in the certificates thereto.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Seventh

Circuit, at office in the City of Chicago, Illinois, this sixth day of January, A. D. 1909.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1909.

No. 1426.

ERASTUS W. WILLARD, Administrator of the Estate of Harold R. Wellman, Deceased, Plaintiff in Error,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY and CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Defendant- in Error.

Stipulation as to Return of Writ of Certiorari.

It is stipulated by and between the parties to the above entitled cause by their respective counsel that the certified copy of the transcript of record in this cause filed by the Clerk of this Court as now on file in the office of the Clerk of the Supreme Court of the United States in an application therein made for a writ of certiorari in this cause entitled in said Supreme Court as Chicago, Burlington & Quincy Railroad Company, Petitioner, vs. Erastus W. Willard, Administrator of the Estate of Harold R. Wellman, deceased, Respondent, File No. 21423 of the October Term, A. D. 1908 of said Supreme Court, shall be taken as a return to the writ of certiorari granted by the said Supreme Court of the United States and issued under date of December 8, A. D. 1908.

A. J. HOPKINS,
Attorney for Petitioner.
DONAHOE, McNAUGHTON & McKEOWN,
Attorneys for Respondent.

Endorsed: Filed Jan. 6, 1909. Edward M. Holloway, Clerk.

[Endorsed:] File No. 21,423. Supreme Court U. S., October Term, 1910. Term No. 105. Chicago, Burlington & Quincy Ry. Co. vs. Erastus W. Willard, Adm'r, &c. Writ of Certiorari and return. Filed Jan'y 8th, 1909.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1908.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, A CORPORATION,

Petitioner,

vs.

ERASTUS W. WILLARD, ADMINISTRATOR OF THE ESTATE OF HAROLD R. WELLMAN,

Respondent.

PETITION FOR CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, The Chicago, Burlington & Quincy Railway Company, respectfully files this its petition and represents and shows unto your Honors the following:

Your petitioner respectfully represents that at the time of the commencement of this cause in the state court of the State of Illinois, your petitioner was and still is a corporation organized and existing un-

der and by virtue of laws of the State of Iowa solely; that it was at the time of the commencement of said cause and still is a citizen of the said State of Iowa and having its principal place of business in the City of Burlington, in said state; that at the time of the commencement of this cause in the said state court of Illinois the plaintiff in said cause and respondent in this petition was and still is a citizen of the State of Illinois.

Your petitioner further shows that this cause was originally instituted in the City Court of the City of Aurora, Kane County, State of Illinois, which is a court of general juirsdiction under the laws of the State of Illinois.

Your petitioner further shows that before the time within which this petitioner was required to answer or plead in said cause under the rules and practice of said City Court had expired, petitioner filed its petition and bond in said City Court praying that said cause be removed to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, and that said City Court accept said bond and enter an order removing said cause to the Circuit Court of the United States. (Rec., 7 to 11. inc.) Thereupon said City Court entered an order removing the cause to the Circuit Court of the United States. (Rec., 15.)

Your petitioner further shows that said cause was instituted in said City Court by the respondent herein for damages in the sum of $10,000 alleged to have been sustained by the next of kin of Harold R. Wellman, deceased, alleged to have been caused by the negligence of the Chicago, Burlington & Quincy

Railroad Company (an Illinois corporation) and this petitioner. The original declaration filed in the City Court consisted of one count only. (Rec., 5.) The petition for removal showed that this respondent was at the time of the commencement of said suit a corporation organized and existing under the laws of the State of Iowa solely and that it was a citizen of said state, and that the plaintiff in said cause was a citizen of the State of Illinois; that about five years prior to the accident which caused the death of plaintiff's intestate the Chicago, Burlington & Quincy *Railroad Company*, a corporation organized and existing under the laws of the State of Illinois, had leased and assigned to your petitioner for a period of 99 years *all* of its lines of railway, rights, privileges, franchises, tracks and appliances and all of its real and personal property, except only the lessor's right and franchise to be a corporation; that since the execution of said lease petitioner had operated the lines of railway covered by said lease and was operating and controlling the same at the time of the accident in question. The petition for removal shows that the Illinois company had transferred and leased off all of its property, both real and personal, except only its franchise to be a corporation. Petitioner further states that it is advised by counsel and believes that under the laws of the State of Illinois the franchise of a corporation is not subject to levy and sale under an execution. The petition for removal further shows that on the day of the accident in question and prior thereto, the lessor company had nothing whatever to do with the management of the railway and appliances, and that the train was being managed by the

agents and servants of this petitioner and shows that the parties to the lease had fully carried out the terms of the lease; that all of the property of the lessor and the custody and control of the same had been turned over to the lessee company; that the Illinois company was simply a naked corporate entity. Said petition for removal further charged that said Chicago, Burlington & Quincy *Railroad Company* was fraudulently and improperly joined as a party defendant in said cause for the sole purpose of defeating the right of this petitioner to remove said cause to the United States Circuit Court for the Northern District of Illinois.

Your petitioner further shows to your Honors that after the entry of the order of removal as aforesaid a transcript of the record of said cause was duly filed in the Circuit Court of the United States, Northern District of Illinois and Eastern Division thereof; that thereupon, on December 24, 1906, the plaintiff made a motion to remand said cause to the state court. On December 26, 1906, said motion coming on to be heard, the motion to remand the cause was *voluntarily withdrawn* by the plaintiff *and he asked and was granted leave to amend the declaration in said cause by filing additional counts, and he thereupon filed nine additional counts and obtained a rule on this petitioner to plead to said amended counts within ten days.* (Rec., 17.) The plaintiff did not take issue with the allegations of the petition for removal that plaintiff had fraudulently joined the Illinois corporation for the purpose of defeating this petitioner's right to remove said cause, and filed no answer, counter affidavit, or

paper of any kind, traversing or denying the allegations of the removal petition and made no explanation whatever as to why or for what reason he made the Illinois corporation a party defendant to said cause which had on the showing of the petition for removal long since leased and parted with all of its property of every kind and character for 99 years, except only the lessor's franchise to be a corporation, which franchise was not subject to sale under execution.

Your petitioner further shows that not only did the plaintiff fail to join issue upon the allegations of said removal petition or contest the same in any manner; but, on the contrary, he voluntarily withdrew his said motion to remand the cause to the state court and asked and was granted leave to file said nine additional counts and thereupon filed the same in said Circuit Court of the United States.

Your petitioner further shows that each and all of these additional counts charged negligence *solely* upon the part of this petitioner in the management and operation of the train which caused the death of plaintiff's intestate; that these additional counts, and each of them, state distinct and separate causes of action against this petitioner alone and constituted causes of action of which the Circuit Court of the United States had full and complete jurisdiction, and which additional counts, petitioner avers, might and could have been filed in said Circuit Court of the United States as an original suit in said court against this petitioner in the identical form in which they were filed in this cause.

Your petitoner further shows that said cause was

in due course called for trial in said Circuit Court of the United States *without any objection or protest* whatsoever upon the part of said plaintiff concerning the removal of said cause, and said plaintiff, by his attorney, examined and participated in the selection of the jury and afterwards introduced evidence in support of his said cause of action without any objection or protest to the jurisdiction of the court or against the removal of said cause; that at the close of plaintiff's evidence in said cause the trial judge directed a verdict in favor of the defendant and thereafter entered judgment on the said verdict, after overruling plaintiff's motion for a new trial; that thereafter, plaintiff prosecuted a writ of error to the Circuit Court of Appeals for the Seventh Circuit; that during the pendency of said cause in said Circuit Court, plaintiff made absolutely no objection whatever to the jurisdiction of the Circuit Court of the United States, except the making of the motion for remand, which he voluntarily withdrew as hereinabove stated; that no question whatsoever was raised by either party to this cause concerning the jurisdiction of said Circuit Court of the United States and that the question as to whether the Circuit Court of the United States had jurisdiction of said cause was not raised by plaintiff's assignments of error and was only raised by the Circuit Court of Appeals of its own motion upon the argument of said cause, and subsequently said Circuit Court of Appeals handed down its opinion, which appears of record, holding that said Circuit Court did not have or acquire jurisdiction of said cause and said Circuit Court of Appeals reversed the judgment of the

Circuit Court with directions to remand the case to the state court of Illinois.

Your petitioner further shows that the said Circuit Court of Appeals in its opinion rendered in this cause holds that the conduct of the plaintiff, in failing to take any issue whatever upon the allegations of the petition for removal and the charge based upon the matters and things therein stated that he had fraudulently joined the Illinois company for the purpose of defeating petitioner's right to remove said cause to the Circuit Court or make any showing whatsoever in opposition to said petition, and in voluntarily withdrawing his said motion to remand and in obtaining leave to file and filing additional counts to his declaration charging distinct acts of negligence on the part of this petitioner, was not an admission on the part of the plaintiff that he had fraudulently joined the Illinois company for the purpose of defeating the jurisdiction of the United States Circuit Court. and that the plaintiff by pursuing such a course did not concede that the cause was properly removed and that the court had jurisdiction.

Your petitioner further shows unto your Honors it is advised by counsel and believes that there are a number of decisions of the Circuit Courts and Circuit Courts of Appeal, one of which was cited approvingly by your Honors in a recent decision, which hold that it is the duty of the plaintiff upon the filing of a petition for removal by a defendant to join issue upon or traverse the allegations of the removal petition or to contest the same in a proper manner,

by affidavit or otherwise, and that upon his failure so to do, the allegations of the removal petition and the defendant's right to remove the cause stand admitted by the plaintiff and authorizes the Circuit Court to take, and such a course confers, jurisdiction of the cause upon the Circuit Court of the United States in cases where a diversity of citizenship exists, as it does in this cause.

Your petitioner further shows that the Circuit Court of Appeals in its opinion filed in this cause holds that the plaintiff, by pursuing the course outlined above and shown by the transcript filed herewith and in filing additional counts containing separate and distinct causes of action against this petitioner, and in going to trial without any objection or protest whatsoever did not concede, nor did such action confer, jurisdiction upon the said Circuit Court, and petitioner states it is advised by counsel that said Circuit Court of Appeals has thereby decided against its jurisdiction in a case which it should have retained.

Your petitioner further states that it is advised by counsel that there are decisions in other circuits which hold that the plaintiff, by pursuing a similar course to that pursued by the plaintiff in this cause, concedes *and admits the allegations in the petition for removal and inferences to be drawn therefrom*, and thereby confers jurisdiction upon the Circuit Court of the United States and is estopped to deny the jurisdiction of such court. Your petitioner further states it is advised by counsel and believes that the decisions make a distinction be-

tween cases wherein the facts alleged and the inferences to be drawn therefrom, which, when admitted, or confessed, confer jurisdiction, and cases wherein the parties seek to confer jurisdiction upon a federal court by consent; that is, your petitioner is advised by counsel, and believes, that there is one class of cases wherein the parties, having admitted certain facts, it is held that jurisdiction attaches, not by the consent of the parties, but by the existence of an *admitted* state of facts; that there is the other class of cases wherein the parties attempt to confer jurisdiction by mere consent, without the existence of facts (admitted or otherwise) necessary to confer jurisdiction; and petitioner is advised by counsel and believes that this cause falls within the first mentioned class of cases.

Your petitioner further shows that there is such a conflict between the decision of the Circuit Court of Appeals for the Seventh Circuit rendered in this cause and the decisions rendered by other Circuit Courts and Courts of Appeal upon the question of the jurisdiction of a Circuit Court arising out of the same or similar facts to those in this cause as warrants and requires this court to issue a writ of *certiorari* to the Circuit Court of Appeals for the Seventh Circuit requiring it to transmit the record in this cause to this court to the end that this court may hear and determine said cause in accordance with the statute in such case made and provided.

Your petitioner further shows that there are decisions of this Honorable Court which hold that in cases which have been removed upon petition of de-

fendants under facts similar to those in this case where such removing defendants proceeded to trial without objection that such removing defendants are estopped to deny the jurisdiction of the Circuit Court, and petitioner avers that under the facts appearing in this record, applying the same principle to the plaintiff, he was estopped from questioning the jurisdiction of said Circuit Court and that said Circuit Court of Appeals erred in holding that the said Circuit Court did not have complete jurisdiction of said cause.

Your petitioner presents herewith and makes a part of this petition a certified copy of the record of this cause in said Circuit Court of Appeals.

Wherefore, this petitioner prays that a writ of *certiorari* may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Seventh Circuit commanding said court to certify and send to this court a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the case therein entitled *Erastus W. Willard, administrator of the Estate of Harold R. Wellman, deceased, plaintiff in error,* v. *Chicago, Burlington and Quincy Railroad Company and Chicago, Burlington and Quincy Railway Company,* defendants in error, No. 1426, of the October term, A. D. 1907, of said court, to the end that the said case may be reviewed and determined by this court as provided by law, and that the judgment of the Circuit Court of Appeals may be reversed by this Honorable Court and the judgment of the Circuit Court of the United

States, Northern District of Illinois, Eastern Division, may be affirmed.

And your petitioner will ever pray.

THE CHICAGO, BURLINGTON & QUINCY
RAILWAY COMPANY.
By ALBERT J. HOPKINS,
Its Attorney.

CHESTER M. DAWES,
Of Counsel.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION,
COOK COUNTY. } ss.

Joseph A. Connell, being first duly sworn, upon oath deposes and says that he is an attorney of the above named petitioner, the Chicago, Burlington & Quincy Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Iowa, and as such is duly authorized to make, and does make, this affidavit for and on behalf of said petitioner. Affiant further states that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein alleged to be on information and belief, and as to those matters he believes the same to be true.

JOSEPH A. CONNELL.

Subscribed and sworn to before me this 12th day of November, A. D. 1908.

CHAS. W. ASHWORTH,
Notary Public.

(Notarial Seal.)

105.

[redacted]

No. [redacted]

Supreme Court, U.
FILED.
NOV 23 1908
JAMES H. McKENNEY
Clerk

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1908.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY,

Petitioner,

vs.

ERASTUS W. WILLARD, ADMINISTRATOR OF THE ESTATE OF HAROLD R. WELLMAN,

Respondent.

Brief on Motion for Certiorari.

ALBERT J. HOPKINS,
Attorney for Petitioner.

CHESTER M. DAWES,
Of Counsel.

BARNARD & MILLER, PRINTERS, CHICAGO.

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ERASTUS W. WILLARD, ADMINISTRATOR OF THE ESTATE OF HAROLD R. WELLMAN,

Respondent.

BRIEF ON MOTION FOR CERTIORARI.

The Supreme Court will issue a writ of *certiorari* in cases where there is a conflict between the decisions of the Federal Courts of different circuits.

Fields v. *United States*, 205 U. S., 292-296.

And will do so where there are questions of jurisdiction involved.

Cochran v. *Montgomery County*, 199 U. S., 260, 270.

In the case at bar the question of the jurisdiction of the Circuit Court and of the Court of Appeals was raised by the latter court, of its own motion,

which held that the Circuit Court had never acquired jurisdiction of the cause notwithstanding the course which was pursued by the plaintiff, as shown by the record.

The defendant filed a petition in the State Court praying for the removal of the cause and charged that the plaintiff had fraudulently joined the Illinois corporation for the purpose of defeating the right of this petitioner to remove the cause to the Federal Court. The charge of fraudulent joinder was based on the averments of the petition, which showed that the plaintiff had joined as a defendant, an Illinois corporation which was to all practical intents and purposes a defunct corporation. There could be no other reasonable inference from the facts stated than that it had been joined for the purpose of defeating petitioner's right to remove the cause. The Illinois corporation had leased and assigned all of its property, real and personal, for a period of ninety-nine years, reserving only its right and franchise to be a corporation. The franchise of a corporation under the laws of Illinois is not subject to levy and sale under an execution.

Hatcher v. *T. W. & W. Ry.*, 62 Ill., 477.

If the plaintiff had obtained a judgment for $10,000, the amount sued for, upon a levy and sale to satisfy such a judgment, he, upon the showing of the removal petition, which was at no time controverted by plaintiff, would have been compelled to attempt to make the amount of his judgment and execution out of a reversionary interest of the Illinois Company in its railway property, which would not revert for a period of ninety-nine years, and necessarily

long after the parties interested as plaintiff or as purchaser has passed to another world.

These facts standing admitted of record, as they were by plaintiff's failure to controvert the same (see authorities hereinafter cited), from the standpoint of the removing defendant, showed there was no other reason for joining the Illinois company, but to defeat the jurisdiction of the Federal Court and the right of this defendant to remove the cause from the State Court.

The plaintiff joined as co-defendant a corporation that was practically defunct for a period of ninety-nine years. Under a reasonable and practical view of the situation, the plaintiff could not reasonably expect to make $10,000 on an execution sale out of a reversionary interest which would accrue ninety-three or ninety-four years after the sale. What practical and honest purpose could he have had in view in joining a mere reversionary interest or a naked corporate existence as a defendant in his suit?

Even assuming that the plaintiff had the technical legal right to join the Illinois company as a party defendant in this suit, the Circuit Court upon the trial of the averments of the removal petition had the right to inquire into and consider the averments of the removal petition and any evidence adduced in support thereof and all inferences that might legally be drawn therefrom. Under the authorities, if the plaintiff desired to oppose the removal petition and the averments therein contained and any inferences that might be deduced therefrom, it was his duty to controvert or contest the same by proper plea or affidavit or in some manner contest

the same, so that the Circuit Court would be advised that the plaintiff did not admit or concede the averments of the removal petition and the inferences which the court might deduce therefrom. From the standpoint of the removing defendant, it was entitled to remove the case, because, in fraud of its right to remove plaintiff jointed as a party defendant the Illinois company which had simply a naked corporate existence as above stated, and it was the plaintiff's duty to contest the position of defendant if he desired to resist the removal of the case.

The case of *Atlanta, etc., Ry.* v. *Southern Ry. Co.*, 153 Fed., 122, is in point. In that case the court said:

> "*The reason why this ground for objecting to the jurisdiction was not earlier made seems to be found in the fact that the Knoxville & Augusta Ry. Co. is a defunct corporation, whose railroad was long since sold to the Southern Ry. Co., and has since been operated by the latter corporation.* This fact was stated in the petition for removal, and the existence of any such corporation as the Knoxville & Augusta R. R. Co. denied. *That petition further averred that the complainant had named the extinct company as a defendant 'improvidently and improperly and for the purpose of attempting to prevent and interfere with your petitioner's rights of removal,' etc., 'and of fraudulently interfering with the legal jurisdiction of said United States courts over this proceeding.' No issue was ever made upon this averment, and the motion to remand was upon other grounds. Averments of fact in a petition to remove, in the absence of some denial by answer or by comparison with the record, must be taken as admitted, and, if sufficient upon their face to justify a removal, all other questions out of the*

way, will entitle the Circuit Court to maintain its jurisdiction. Dishon v. *C. N. O. & R. Co.,* 133 Fed., 471, 474; 66 C. C. A., 345."

Your Honors will note that in the case above quoted, the plaintiff had joined a company that had sold its railway to another company and was practically defunct. The only difference between that case and the case at bar is that it was claimed by the removing defendant in the case above cited that the plaintiff had joined a railway company that had sold its property, and in this case it was alleged that the Illinois company had parted with all of its property for ninety-nine years.

A case very much in point is that of *Kelly* v. *Chicago & Alton Ry. Company,* 122 Fed., 286, which was an action against a lessee and lessor. The court in that case, on page 289, says:

"Even where the petition stating the cause of action, on its face, presents a joint liability between a resident and non-resident defendant, it may nevertheless be shown in the petition for removal that in fact no cause of action exists against the resident defendant, and that his joinder as a co-defendant was for the purpose of defeating the removal of the cause, and where this allegation of the petition for removal is supported by proofs, as by affidavits, it devolves upon the plaintiff to take issue upon this fact, which issue shall be tried by the United States Court, *and, if the plaintiff fail to controvert such petition and affidavit, the allegations of the petition for removal stand admitted. Ross* v. *Erie R. Co. et al.* (C. C.), 120 Fed., 703; *Dow* v. *Bradstreet Company et al.* (C. C.), 46 Fed., 824, 827, 828; *Durkee* v. *Illinois Central R. R. Co.* (C. C.), 81 Fed., 1; *Prince* v. *Ill. Cent. R. R. Co.* (C. C.), 98 Fed., 1; *Arrowsmith* v. *N. & D. R. Co.* (C. C.), 57 Fed., 170."

In *Ross* v. *Erie R. R. Company,* 120 Fed., 703, on page 704, the court says:

> "The averments in the petition in the action at bar are the unwarranted association of the Erie Railroad Company with the coal company, for the purpose of preventing removal of the action. *If the plaintiff disclaimed these allegations, he should have joined issue upon the facts alleged or at least controverted the same. But no evidence is offered repelling either the alleged facts or the accusations, and, within the practice of the court, it must be accepted as true.*"

In *Durkee* v. *Illinois Central Railroad Company,* 81 Fed., 1, on page 2, Judge SHIRAS says:

> "Under the views expressed in that case, which I now see no reason to change, it is open to the plaintiff to join issue upon the facts alleged in the petition for removal, which are relied on as showing that the Cherokee & Dakota Company must be held to be merely a nominal party, and, if issue is joined, the court will hear the evidence thereon; *but unless issue is thus made on this question, the allegations of the petition, being supported by affidavit, will be taken to be true, and in that event it must be held that the case was properly removed into this court.*"

In the case of *Dishon* v. *C. N. O. & T. P. Ry. Co.,* 133 Fed., 471, commencing on page 475, the Court of Appeals for the Sixth Circuit said:

> "Conceding that the intent with which a party is made defendant is not material, where a cause of action exists, and the defendant is brought into court in good faith, with the intention of keeping him there and prosecuting the case against him to a conclusion it is settled that where a person is made a defendant for the sole purpose of preventing the removal of the case to the United States Court, and without

any intention of prosecuting the case against him, the court will consider him a merely nominal or sham defendant—made so for a fraudulent purpose—whose presence in the case can be ignored.

The averments of the petition for removal were not simply denials of the allegations of the plaintiff's petition. They were affirmative in form and substance. They charged a case of fraudulent joinder. If, as they alleged, Coffman did not in any sense contribute to the death of the plaintiff's intestate—if the plaintiff knew this fact, and, although Coffman was not a citizen of Kentucky, made him a party defendant for the sole purpose of defeating the removal of the case to the United States Court—a case for removal, regardless of Coffman's nominal presence, was presented. If these averments were not true, the plaintiff should have denied them, and an issue would then have been made for the court below to try and determine. No answer was filed, no issue in any other way was taken. The plaintiff contented himself with making a motion to remand, and which only raised a legal question, namely, whether, upon the facts stated in the petition for removal, taken in connection with the record, a case for removal was made out."

In *Dow* v. *Bradstreet Co.* (C. C.), 46 Fed., 824, it was held that a co-defendant joined for the mere purpose of preventing a removal might be regarded by the Federal Court as a merely nominal party; Judge SHIRAS saying:

"To properly present the question, the allegations of fact relied on as showing the fraudulent joinder of the party should be made in the petition for removal, unless they otherwise appear upon the face of the record. If the facts alleged, if true, make out the charge of fraudulent misjoinder of parties for the purpose

named, and the other party desires to take issue upon the truth thereof, then the trial thereof must be had in the Federal Court." Citing cases.

In this case the court further says, after recounting the allegations of the petition (page 828):

"The motion to remand does not raise an issue upon the facts thus alleged and sustained, but presents the legal question already discussed, and upon these the ruling must be adverse to the motion to remand."

In *Durkee* v. *Ill. Cent. R. Co.* (C. C.), 81 Fed., 1, the petition for removal alleged that one of the defendants was joined for the sole purpose of defeating the jurisdiction of the Federal Court; and it was held that, no issue being taken, the facts alleged in the petition, which was supported by affidavit, would be taken as true, and the motion to remand overruled. It was open to the plaintiff to join issue upon the facts alleged in the petition for removal. If he did not, "the allegations of the petition, being supported by affidavits, will be taken as true." There was a motion to remand, but it was held it did not operate as a denial of the allegations of the petition for removal.

In *Kelly* v. *Chicago, etc., Ry. Co.* (C. C.), 122 Fed., 286, Judge PHILIPS said (page 289):

"Even where the petition stating the cause of action on its face presents a joint liability between a resident and a non-resident defendant, it may nevertheless be shown in the petition for removal that in fact no cause of action exists against the resident defendant, and that his joinder as a co-defendant was for the purpose of defeating the removal of the cause, and that

where this allegation of the petition for removal is supported by proofs, as by affidavits, it devolves upon the plaintiff to take issue upon this fact, which issue shall be tried by the United States Court, *and, if the plaintiff fail to controvert such petition and affidavit, the allegations of the petition for removal stand admitted.*" *Ross* v. *Erie R. Co.* (C. C.), 120 Fed., 703; *Dow* v. *Bradstreet Co.* (C. C.), 46 Fed., 824; *Durkee* v. *Ill. Cent. R. Co.* (C. C.), 81 Fed., 1; *Prince* v. *Ill. Cent. R. R. Co.* (C. C.), 98 Fed., 1; *Arrowsmith* v. *N. & D. R. Co.* (C. C.), 57 Fed., 170.

In *Weaver* v. *Northern Pacific R. Co.* (C. C.), 125 Fed., 155, Judge KNOWLES says:

> "Where the petition for removal states jurisdictional facts such as citizenship, etc., which are not true, the plaintiff may traverse these facts by allegations in the nature of a plea in abatement, and the court can receive evidence to determine the same." Dillon's Removal of Causes, 158, Note 4.
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> * * * * * * *
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> "The undenied allegations of the petition for removal, taken in connection with the fact that Coffman had not been served and no attempt was being made to serve him, and no explanation of the failure to serve him was given, amply justified the court, in our opinion, in refusing to remand the case."

The Dishon case, *supra*, is quoted approvingly by your Honors in the case of *Kentucky* v. *Powers*, 201 U. S. 1, 34.

Your Honors will bear in mind that in the case at bar the plaintiff withdrew his motion to remand and asked and was granted leave to file additional counts, which alleged separate and distinct acts of negligence upon the part of the removing defendant only.

Your Honors will note from the authorities above cited that it is the duty of a plaintiff, if he wishes to contest the right of a defendant to remove a case and the jurisdiction of the Federal Court he must join issue with the averments of the petition and contest the same in same proper manner, and if he fails to do so, the allegations of the petition and the right to remove are conceded and jurisdiction is conferred upon the Circuit Court.

Your Honors will note by reading the opinion of the Circuit Court of Appeals in the case at bar that the court held that plaintiff's failure to press his motion to remand, or to take other proceedings in the Federal Court, are without force to enlarge the statutory authority of the Federal Court in causes brought in the State Court. In other words, the Court of Appeals refuses to give effect to the rule announced in the cases above cited. The court further says that the plaintiff's neglect to prosecute his case in the State Court is not abandoned by the plaintiff's procedure thereafter in the Federal Court through amended declaration or otherwise. The decision of the court in this case is clearly contrary to the universal holding in other circuits as is indicated by the quotations above set forth and the cases therein cited.

The opinion of the court handed down in this case is also at variance with the cases of *Davies* v. *Lathrop*, 13 Fed., 565; *Edgerton* v. *Gilpin*, 3 Woods, 277 (Fed. Cas. No. 4280), and *Carrington* v. *Florida R. Co. et al.*, 9 Blatchf., 467 (Fed. Cas. No. 2447).

In the Davies case (13 Fed., 565), in an opinion by Wallace, Circuit Judge, the court said:

"The plaintiffs having brought this action in the State Court, the defendant removed it into this court upon a petition alleging the plaintiffs to be citizens of the State of New York and the defendant to be a citizen of the State of New Jersey. The case was tried in this court and resulted in a verdict for the defendant. The plaintiffs now move to remand the action to the State Court upon the ground that, in fact, one of the plaintiffs was and is a citizen of the same state with the defendant. Concedely, the controversy not being a divisible one, the defendant was not entitled to remove the cause originally, and had a motion been made by the plaintiffs before the trial of the case the motion must have prevailed. The question now is, however, whether the plaintiffs, by their conduct, have not lost their right to have the action remanded. If it can be lost by waiver in any case, it has been lost here. It is not asserted that the defendant knew or had reason to suppose that either of the plaintiffs was a citizen of the same state with himself. It is therefore to be assumed that he acted in good faith in removing the cause, but was mistaken as to a fact which was peculiarly within the knowledge of the plaintiffs. The plaintiffs, knowing the truth, chose, instead of moving to remand, and thereby correcting the mistake, to permit the defendant to incur the burden of a trial. Apparently they concluded to take the chances of trial, with the view of remaining silent if it should result favorably, but of springing the objections if it should result adversely. Such practice will not be willingly tolerated, because it is unjust to the party who has been subjected to the expense of a futile trial, and because it imposes upon the court the labor of a nugatory proceeding. Unless the inflexible rules which require courts to entertain jurisdictional objections whenever urged must control, it should be held that plaintiffs have waived their right to assert now what

good faith and a just regard to decorous procedure required them to assert before the trial of the action. Authorities are not wanting to the effect that a party may waive his right to insist that the court has not jurisdiction over the controversy because of the status of the parties; and these authorities address themselves to the precise point here, and decide that a party will not be permitted to show that the plaintiff and defendant are citizens of the same state in order to oust the jurisdiction of the court, unless he has availed himself of the right to do so by conforming to established rules of practice. Thus, a defendant will be precluded from showing this fact upon the trial when he has omitted to raise the point by a plea to the jurisdiction. He waives it by answering to the merits. *D'Wolf* v. *Rabaud*, 1 Pet., 476; *Evans* v. *Gee*, 11 Pet., 80; *Sims* v. *Hundley*, 6 How., 1; *Sheppard* v. *Graves*, 14 How., 505; *Sobrey* v. *Nicholson*, 3 Wall., 420.

"As is said by Chief Justice WAITE in *Ry. Co.* v. *Ramsey*, 22 Wall., 322:

"Consent of parties cannot give the courts of the United States jurisdiction, but the parties may admit the existence of facts which show jurisdiction, and the courts may act judicially upon such an admission. *The cases referred to show that the admission may be implied from the acts or omissions of parties, and is as effectual when so implied as though explicitly stipulated.*"

"Upon analogy and principle it should be held that the party loses his right to object to the removal of an action, when it has been removed on the ground of the diverse citizenship of parties by going to trial and trying the cause without raising the objection.

"Although Section 5 of the Act of Congress of March 3, 1875, regulating the removal of causes, among other things, directs the remanding of a cause if it shall be made to appear at any time that it does not really and substantially

involve a controversy properly within the jurisdiction of the Circuit Court, the context indicates that the provision is intended to apply only to causes which have been collusively removed. The section was evidently intended to protect parties and the Circuit Courts from an abuse of the federal jurisdiction, by transferring to these courts controversies which are only colorably and not 'really and substantially' those of federal cognizance. Cases may arise where the real character of the controversy is not made manifest until the trial. The section is 'for the protection of the court as well as the parties against fraud upon its jurisdiction.' *Williams* v. *Town of Ottawa*, Sup. Ct., Octo. term, 1881. It should not be construed to apply to a case like this, where the removal was not collusive, and where the party now objecting by his conduct has admitted that the court has jurisdiction to hear and determine the cause. The motion is denied."

In *Carrington* v. *Florida R. Co.*, 9 Blatchf., 467, the court said:

"This action was orginally commenced in the Supreme Court of the State of New York, and is now upon the docket of this court, by virtue of proceedings taken to remove it, as against two of the defendants, from the State Court to this court, in pursuance of the Act of Congress of July 27, 1866. (14 Stat., 306.) It now comes before the court upon a motion made by the plaintiff to remand the cause to the State Court, upon the ground that it is of such a nature as not to be within the scope of the act of 1866, it being, however, admitted, that the defendants are citizens of another state.

"It appears to me a sufficient answer to this motion to say, that it is made to appear, that, after the record of removal was filed in this court, *the plaintiff pleaded anew in this court*, and, in his bill, set up the removal of the cause

> into this court as having been effected by the proceedings taken by these defendants, *without any suggestion that the case was not removed, and properly so. The case is now at issue in this court, upon the plaintiff's bill filed here, and the answer and demurrer of the defendants; and it is too late now for the plaintiff to ask that the cause be remanded, on motion.* The motion to remand is denied."

In *Edgerton* v. *Gilpin, supra,* the case was removed from a State Court of Texas to the Circuit Court for the Eastern District of Texas on the ground of diverse citizenship. The court in an opinion by Bradley, Circuit justice, said:

> "The statements (of the removal petition) as to the citizenship of the parties have never been denied." * * * *The parties* have acquiesced in the removal for years, and *have been proceeding with the litigation of the cause in this court without objection.* Every ground of objection to the jurisdiction had been removed. *We think the parties are entirely estopped from removing to remand at this stage."*

It is clearly apparent from a reading of the cases cited herein and of the opinion of the Circuit Court of Appeals in this case that there is a conflict between the decision of the Court of Appeals in the case at bar and the decisions above referred to upon the question of jurisdiction of the Circuit Court arising out of similar circumstances.

The Circuit Court of Appeals in the case at bar refused to give or allow any effect to the course of the plaintiff in voluntarily withdrawing his motion to remand and in filing the additional counts to his declaration charging separate and distinct acts of negligence on the part of this petitioner and in try-

ing his case without any objection whatsoever to the removal of the cause or the jurisdiction of the court.

The nine additional counts that were filed by the plaintiff set forth that the Illinois company had leased its road to this petitioner and then charge negligent acts on the part of this petitioner solely in the operation of the train which caused the death of plaintiff's intestate.

These counts stated causes of action solely against this petitioner *and which counts might have been filed as an original suit in the Circuit Court and acts for which the Illinois company could not be held liable.* *Hayes* v. *N. P. R. R. Co.*, 74 Fed., 279; *Arrowsmith* v. *The N. & D. R. Co.*, 57 Fed., 165.

These counts were filed by leave of court after plaintiff had voluntarily withdrawn his motion to remand without making any issue whatever upon the sufficiency of the removal petition. As we have said, these counts charged separate and distinct causes of action against this petitioner alone and the plaintiff having elected to make the Circuit Court his forum in which to prosecute his suit and having tried the case there without any objection whatsoever, the plaintiff ought not now to be heard to say, nor should the Circuit Court of Appeals have decided, that the Circuit Court was without jurisdiction, under the facts appearing in this record.

While it is true that mere consent of the parties to a cause cannot give a court of the United States jurisdiction of a case of which it would not otherwise have jurisdiction, yet the Court of Appeals in this case seems to have disregarded or overlooked the well settled proposition of law that *a party may*

admit the existence of a state of facts, which show or confer jurisdiction and that seems to be the theory upon which the Circiut Court and Courts of Appeal of other circuits assume or take jurisdiction of cases where a fraudulent joinder is charged and not controverted. In other words, by failing to controvert or contest the charge of the petition, the fraudulent joinder is admitted and jurisdiction attaches, not that the consent of the parties confers jurisdiction. The principle that the parties may admit the existence of facts which show jurisdiction and that the courts may act judicially upon such an admission was settled by the case of *Ry. Co.* v. *Ramsey*, 22 Wall., 322. The court in that case, among other things, said:

> "Either party upon the filing of the papers could have moved to remand, or the court itself, without a motion could have sent the case back if the jurisdiction did not appear. As both the court and the parties accepted the transfer, it cannot be doubted for a moment that the files did then contain conclusive evidence of the existence of the jurisdictional facts."

The case of *Sheppard and Duncan* v. *Graves*, 14 How., 505, and the other cases cited by Judge Wallace in his opinion in *Davies* v. *Lathrop*, 13 Fed., 565, are to the same effect.

Therefore in this case we contend that the plaintiff by withdrawing his motion to remand, filing his additional counts and proceeding to trial, conceded the jurisdiction of the Circuit Court and the Court of Appeals erred in holding otherwise.

It has been held by this court in a number of cases and in the Circuit Courts that it does not lie

in the mouth of a defendant, who removes a case and has it tried in the Circuit Court, to say that the Federal Court had no jurisdiction and that such defendant is estopped to question the jurisdiction of the court to which he has removed the case.

Cowley v. *N. P. R. R. Co.*, 159 U. S., 569.
Ayers v. *Watson*, 113 U. S., 594, 599.
Mastin v. *C., R. I. & P. Ry Co.*, 123 Fed., 827, 832.

If a defendant after removing a case to the Federal Court tries it there, and is estopped to question the jurisdiction, why should not a plaintiff, after a case is removed upon a petition of a defendant, charging fraudulent joinder, etc., and who voluntarily withdraws a motion to remand and files additional counts in the Circuit Court and then proceeds to submit his case on the merits to the federal tribunal without objection or protest, in justice, be likewise estopped?

In *Davies* v. *Lathrop, supra* (13 Fed., 565), the court said:

> "The question now is, however, whether the plaintiffs, by their conduct, have not lost their right to have the action remanded. * * * The plaintiffs, knowing the truth (with reference to the question of diverse citizenship) chose instead of moving to remand and correcting the mistake, to permit the defendant to incur the burden of a trial. Apparently they concluded to take the chances of trial, with the view of remaining silent if it should result favorably, but of springing the objection if it should result adversely. Such practice will not be willingly tolerated, because it is unjust to the party who has been subjected to the expense of a futile trial, and because it imposes upon the court the labor of a nugatory proceeding" * * * and

> "where the party now objecting, by his conduct, has admitted that the court had jurisdiction to hear and determine the cause, the motion is denied."

The Court of Appeals cites *Alabama Great So. Ry.* v. *Thompson,* 200 U. S., 206. But in that case this court stated expressly that it was not considering a case of fraudulent joinder, and your Honors so held in *Wecker* v. *National Co.,* 204 U. S., page 182.

We therefore respectfully urge that the plaintiff, having admitted the jurisdiction of the Circuit Court and that the cause was properly removed, the Court of Appeals erred in holding that the Circuit Court had no jurisdiction and denying its own jurisdiction of the case.

Your Honors in the case cited below said:

> "But while the judgment of the Circuit Court of Appeals must be regarded as final and the writ of error dismissed *we deem it our duty to grant the writ of certiorari,* to which the record on the writ of error may stand as a return, *in order to pass upon the question of the jurisdiction of the Circuit Court, in the exercise of one of the essential functions of this court,* the determination of the jurisdiction of the courts below." *Cochran et al.* v. *Montgomery County,* 199 U. S., 260, 270.

The petitioner therefore respectfully prays this court to issue a writ of *certiorari* as prayed for in the petition filed herewith to the end that this case may be heard and determined by this honorable court, in accordance with the statute in such case made and provided.

ALBERT J. HOPKINS,
Attorney for Petitioner.

CHESTER M. DAWES,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1908.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY,

Petitioner,

vs.

ERASTUS W. WILLARD, ADMINISTRATOR OF THE ESTATE OF HAROLD R. WELLMAN,

Respondent.

RESPONDENT'S BRIEF.

Under the law of the State of Illinois, the lessor, Railroad Company is jointly liable with the lessee Railroad Company for the wrongful acts of the latter.

P. & R. I. R. R. Co. vs. *Lane, admx.*, 83 Ill., 448.

Balsey vs. *St. Louis* N *Terre Haute R. R. Co.*, 119 Ill., 68.

Pa. Co., et al., vs. *Ellett, admr.*, 132 Ill., 654.

Chicago & Grand Trunk Ry., et al., vs. *Hart*, 209 Ill., 414.

Such being the law of Illinois, the joinder of the domestic corporation (the lessor) with the foreign corporation, (the lessee) was proper and established the "good faith" on the part of the plaintiff in electing to bring a joint action.

The allegation in the petition for removal that, the domestic corporation *"was fraudulently and improperly joined as a party defendant in this cause for the sole purpose of defeating the right of this petitioner to remove said cause to the United States Circuit Court for the Northern District of Illinois and Eastern Division thereof"* ——— is not an averment of fact, but is a mere conclusion of the pleader and not traversable.

In every pleading by which the existence of fraud is put in issue, the facts constituting fraud must be distinctly and directly averred. General allegations and mere conclusions of law are insufficient.

Stearns vs. *Page*, 7 How., 819-829.

Wood vs. *Carpenter*, 101 U. S., 135.

Where the pleadings do not on their face, show a separable controversy, its existence must be averred in the petition for removal *by the statement of the facts* from which the conclusion arises.

Anderson vs. *Boughes*, 40 Fed., 708.

Pleadings must state facts, not conclusions of law.

Alabama vs. *Burr*. 115 U. S., 413.

An allegation that what was done was "colorable" or

"fraudulent" is a conclusion of law which a demurrer does not admit.

Fogg vs. *Blair*, 139 U. S., 118.

Counsel for petitioner emphasizes the fact that at the time this suit was instituted in the State Court, the domestic corporation had leased its railroad tracks, equipment, property, rights and franchises to the Iowa Company, for a period of ninety-nine (99) years, and assumes that such action on the part of the domestic corporation rendered it execution proof, thereby making its joinder as co-defendant with the foreign corporation improper.

The mere fact that a railroad company enters into a lease, leasing its railroad equipments, etc., to another railroad company, does not render it insolvent, and even if it should be admitted that it did, insolvency on the part of the domestic corporation could not deprive a person sustaining an injury at the hands of another for whose acts the domestic corporation was, in law, responsible, from electing to bring a joint action against both tort feasors.

An action of tort, which might have been brought against many persons or against any one or more of them, and which is brought in a State Court against all jointly, contains no separate controversy, which will authorize its removal by some of the defendants to the Federal Circuit Court, even if they file separate answers and set up different defenses from the other defendants and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one.

Alabama G. S. R. Co. vs. *Thompson,* 200 U. S., 206.

Powers vs. *Chestpeka, etc., R. R. Co.,* 169 U. S. 97.

Louisville, etc., R. Co. vs. *Wqngelin,* 132 U. S., 601.

Plymouth Gold Mining Co. vs. *Amadore, etc., Canal Co.,* 118 U. S., 264.

Pirie vs. *Tvedt,* 115 U. S., 43.

Sloane vs. *Anderson,* 117 U. S., 275.

Lyttle vs. *Giles,* 118 U. S., 596.

Torrence vs. *Shed,* 144 U. S., 530.

Connell vs. *Smiley,* 156 U. S., 340.

Hyde vs. *Rubel,* 104 U. S., 407.

Ayres vs. *Wiswall,* 112 U. S., 192.

Warax vs. *Cincinnati, etc., R. Co.,* 72 Fed., 640.

Ill. Central R. R. Co. vs. *LeBlanc,* 74 Miss., 626.

A defendant has no right to say that an action shall be separate, which a plaintiff elects to make joint. A separate defense may defect a joint recovery, but it can not deprive a plaintiff of his right to prosecute his own suit to final determination in his own way.

Pirie vs. *Tvedt,* 115 U. S., 43.

Alabama G. S. R. Co. vs. *Thompson,* 200 U. S., 206.

The question whether there is a separable controversy, warranting a removal, must be determined by the state of the

pleadings and the record of the case at the time of the application for removal.

Alabama G. S. R. Co. vs. *Thompson*, 200 U. S., 206.

Wilson vs. *Oswego Tp.*, 151 U. S., 65.

Merchants Cotton Press., etc. Co. vs. *Ins. Co. of N. Am.*, 151 U. S., 384.

Louisville, etc. R. R. Co. vs. *Wqngelin*, 132 U. S., 601.

In determining whether there is a separable controversy, the cause of action is for all the purposes of the suit whatever the plaintiff declares it to be in its pleadings and the allegations of the plaintiff must be accepted as true.

Alabama G. S. R. Co. vs. *Thompson*, 200 U. S., 206.

Torrence vs. *Shed*, 144 U. S., 530.

Louisville, etc., R. R. Co. vs. *Ide*, 114 U. S., 52.

Lyttle vs. *Giles*, 118 U. S., 601.

Plymouth Gold Mining Co. vs. *Amador, etc., Canal Co.*, 118 U. S., 270.

Deere vs. *Chicago, etc., R. R. Co.*, 85 Fed., 881.

Warax vs. *Cincinnati, etc., R. Co.*, 72 Fed., 640.

Offnes case, 148 Fed., 201.

Respectfully submitted,

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ARTHUR J. EDDY,
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Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1910.

No. 105

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY,

Petitioner.

vs.

ERASTUS W. WILLARD, ADMINISTRATOR OF THE ESTATE OF HAROLD R. WELLMAN, DECEASED,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF AND ARGUMENT FOR PETITIONER.

STATEMENT OF THE CASE.

This suit was originally commenced in the City Court of Aurora, Kane County, State of Illinois, by respondent, a citizen of the State of Illinois, as Administrator of the Estate of Harold R. Wellman, deceased, by filing a declaration, consisting of one count (Trans., 5) against the Chicago, Burlington & Quincy Railroad Company, an Illinois corporation,

and this petitioner, a corporation of the State of Iowa.

Before the time expired for respondent to plead, in accordance with the practice of the State Court, petitioner filed its petition to remove said cause to the Circuit Court of United States for the Northern District of the State of Illinois, Eastern Division. The petition appears on pages 7 to 10, inclusive, of the transcript. The petition claimed that the Chicago, Burlington & Quincy Railroad Company, which was an Illinois corporation, was a mere nominal defendant, and was joined in said cause for the purpose of defeating the right of petitioner to remove said cause of the United States Court, and shows that the Chicago, Burlington & Quincy Railroad Company, the Illinois corporation, had parted with all its property and rights for a period of 99 years, and that the only thing that was reserved to the Illinois corporation by the lease described in the petition was the right of the lessor to exist as a corporation. A bond was duly filed in the State Court and approved. Thereupon the City Court of Aurora entered an order transferring the cause to the United States Circuit Court, Northern District of Illinois, Eastern Division, and the clerk was directed to transmit a full and complete transcript of the record to the said court. This order appears at the bottom of page 15 of the transcript. The record was thereupon transmitted to the Circuit Court of the United States. On December 24, 1906, the plaintiff entered a motion in the Circuit Court of United States to remand the cause to the State Court. The motion was heard

in part, and postponed until the following Wednesday, which was December 26, 1906. (Tr., 17.)

On December 26, 1906, leave was given the plaintiff on his motion to withdraw the motion to remand, and to amend his declaration by filing additional counts instanter, and the defendants were ruled to plead to the said amendments within ten days. (Tr., 17.) Thereupon on the same day, December 26, 1906, pursuant to the leave which he had obtained, the plaintiff filed in said Circuit Court of the United States nine additional counts to his declaration. These additional counts commence at page 18 of the transcript and run to page 45. The additional counts are prefaced with the statement embodied therein by the plaintiff as follows:

> "Additional counts to plaintiff's declaration, leave to file the same having been first had and obtained." (Tr., 18.)

The first additional count contains a recital that the Chicago, Burlington & Quincy Railroad Company had theretofore leased said railroad to the defendant, the Chicago, Burlington & Quincy Railway Company, and that the Railway Company, from thence forward, and on the date of the accident, ran and operated engines and trains of cars, etc., and then avers that no bell was rung or whistle sounded until the crossing in question was reached

> "by means whereof *the defendant, the Chicago, Burlington & Quincy Railway Company, wholly failed and made default* contrary to the form of the Statute in such case made and provided, by means and *in consequence of which default and neglect of the defendant, the Chicago, Bur-*

lington & Quincy Railway Company, as aforesaid,"

the locomotive in question struck and killed plaintiff's intestate, etc. (Tr., 19.)

Additional count No. 2 contains a recital that the Railroad Company had leased the railroad in question to this petitioner, the Iowa corporation, and then charges that while the deceased was crossing the tracks, in the exercise of care for his own safety,

> "the *said Chicago, Burlington & Quincy Railway Company so carelessly, negligently and improperly managed and drove said locomotive engine and train of cars* lastly above mentioned over * * * said railroad, that by, through and *in consequence of the carelessness and negligence and improper conduct of said Chicago, Burlington & Quincy Railway Company in that behalf,* said locomotive engine last aforesaid struck and killed plaintiff's intestate," etc. (Tr., 23.)

Additional count No. 3, which commences at page 23 of the transcript, avers that there were three tracks at the point of the accident, and that there was much travel over the highway in question, and that there was a street car track running across the street where the accident occurred, etc.; that the railroad in question had been theretofore leased to the Railway Company by the defendant, the Chicago, Burlington & Quincy Railroad Company; further avers that in the use and management and operation of said railroad, *the defendant, this petitioner, caused a very large number of trains to be run over and across Harlem avenue crossing,* the point of the accident; further avers that good railroading and proper regard for the lives of the inhabitants of the Villages of Berwyn and Riverside required

that *the defendant Railway Company* should employ a watchman to give warning to the traveling public, etc. (Tr., 25), then charges *that the defendant, this petitioner, wholly regardless of its duty in the premises,* carelessly and negligently caused a locomotive engine with a train of cars thereto attached to be run over at a high rate of speed; that

> "*the Chicago, Burlington & Quincy Railway Company failed and neglected to employ a flagman, use gates or other means* for the protection of the traveling public * * * by means whereof said locomotive engine and train of cars first above mentioned so run and operated by the defendant, the Chicago, Burlington & Quincy Railway Company at a high and dangerous rate of speed, as aforesaid, was run over and against the body and person of plaintiff's intestate." (Tr., 26.)

Additional count No. 4 is substantially the same as count 3. (Tr., 30.)

Additional count 5, commencing at page 31 of the transcript, contains no allegations whatever about a lease. It simply charges that "the defendants" were possessed of and using and operating a certain railroad from the City of Chicago to and beyond the City of Aurora, which passed through the Villages of Berwyn and Riverside; that where said railroad crossed Harlem avenue, was a certain highway which was used very extensively by inhabitants of the Villages of Berwyn and Riverside; that it thereupon became and was the duty of the said defendants in the operation of said railroad to so run and operate said locomotive engine and train of cars as not to expose plaintiff's intestate to unnecessary hazard and danger, yet "the said defendants," wholly re-

gardless of their duty, etc., ran a train at a high rate of speed, to-wit: sixty miles an hour, without providing the means to warn said intestate and the public generally of the approach of said train toward Harlem avenue, and while the deceased was in the exercise of ordinary care, he was struck and killed. (Tr., 32.)

Additional Count 6, which commences at page 32 of the transcript, charges that the Chicago, Burlington & Quincy Railroad Company owned a certain railroad, and that the defendant, Chicago, Burlington & Quincy Railway Company for a long time prior to the accident, etc., had run and operated locomotive engines and cars over said railroad, which crossed Harlem avenue; that

> *"the said Chicago, Burlington & Quincy Railway Company, being so engaged in running and operating said railroad,"*

ran a train of cars over the crossing, and that no bell or whistle was sounded, contrary to the statute

> "by means and *in consequence of which default and neglect of the defendant Chicago, Burlington & Quincy Railway Company,* as aforesaid,"

the locomotive engine ran against plaintiff's intestate and killed him. (Tr., 33.)

Additional count No. 7, commencing at page 34 of the transcript, charges that on the day of the accident, and for a long time prior thereto, the defendant, the Chicago, Burlington & Quincy Railroad Company was the owner of the railroad, and which said railroad was on the day last aforesaid, and for many years prior thereto had been operated by the Chicago, Burlington & Quincy Railway Company, this petitioner; that the district was a populous one, etc.;

that this petitioner ran and operated cars on said line of railroad; that said defendant

> "*the said Chicago, Burlington & Quincy Railway Company so carelessly, and negligently drove said locomotive engine, train and cars* * * * that by and through and *in consequence of the carelessness, negligence and improper conduct of said Chicago, Burlington & Quincy Railway Company in that behalf,* said locomotive engine last aforesaid, struck plaintiff's said intestate," etc. (Tr., 37.)

Additional count No. 8, which commences at the bottom of page 37 of the transcript, charges the railroad company was the owner of a certain railroad, and that on the day of the accident and long prior thereto, said railroad was being run and operated by this petitioner; that this petitioner, in the use thereof, ran a large number of trains over the crossing in question; that good railroading, etc., *required the defendant, the Chicago, Burlington & Quincy Railway Company* to employ a watchman or maintain gates or other adequate means to protect travelers over the highway (Tr., 39); that

> "said defendant, *the Chicago, Burlington & Quincy Railway Company, failed and neglected to employ a flagman, use gates, or other means* for the protection of the traveling public then and there using said crossing,"

by means whereof the train ran into and struck plaintiff's intestate.

Additional count No. 9 avers that on the date of the accident and a long time prior thereto, the defendant, Chicago, Burlington & Quincy Railroad Company, owned a certain railroad, and which for many years prior thereto had been run and operated by

the Chicago, Burlington & Quincy Railway Company (Tr., 41); describes the *locus in quo,* and avers a large number of trains were run over the crossing in question, and it became and was the duty of *the defendant Railway Company* to so run and operate said (Tr., 43)

> "locomotive engines, cars and trains, and to so guard and protect the traveling public at said Harlem avenue crossing, as not to expose the public to unnecessary hazard and danger, *yet the said defendant, the Chicago, Burlington & Quincy Railway Company, wholly regardless of its duty* in that behalf, then and there carelessly and negligently caused a locomotive engine"

to run at a high rate of speed, and in so doing failed and neglected to employ flagmen or other means of warning the public, etc., by means whereof the train was run against plaintiff's intestate and he was killed.

We have summarized the allegations of these additional counts for the purpose of showing to the court that everyone of these additional counts, with the possible exception of additional count No. 5, stated and charged acts of negligence on the part of this petitioner alone, and which stated upon their face good and valid causes of action against this petitioner, and which might have been filed as an original cause of action in the Circuit Court of the United States against this petitioner.

In compliance with the order, which was entered by the court on December 26, 1906, giving the plaintiff leave to withdraw his motion to remand and to amend his declaration by filing additional counts, and directing that

"the defendants are ruled to plead to said amendments within ten days," (Tr., 17)

the defendants found a plea of the general issue. (Tr., 45.) On June 27 the cause was called for trial and each of the parties proceeded to examine and select the jury, and to make their opening statements. (Tr., 46.) Thereafter the plaintiff introduced the evidence that he desired to offer in support of his cause of action.

Thereupon at the close of plaintiff's evidence, the defendants offered a motion to direct a verdict in favor of the defendants, which the court did. The opinion of the trial court appears at page 125 of the transcript.

Afterwards plaintiff filed his motion for new trial (Tr., 126), which was overruled. Thereupon plaintiff sued out a writ of error to the Circuit Court of Appeals for the 7th Circuit. The assignments of error in the Court of Appeals commence at page 131 of the transcript.

After plaintiff withdrew his motion to remand, no suggestion was made whatsoever, by the plaintiff or defendant, that the Circuit Court of the United States did not have full and complete jurisdiction of the cause. Plaintiff withdrew his motion to remand and asked and was granted leave to file additional counts, which we have summarized above, and pressed this case for trial in said court. No suggestion was made in the trial court in the motion for new trial, nor at any other time, nor in the assignments of error in the Court of Appeals, that the Circuit Court of the United States did not have complete jurisdiction of the cause. The first intima-

tion or suggestion questioning the jurisdiction of the trial court came from one of the judges sitting upon the bench of the Court of Appeals.

On October 6, 1908, the Court of Appeals filed its opinion, which commences at page 146 of the transcript, concluding as follows:

> "For want of jurisdiction in the trial court, therefore, under the removal proceedings, the judgment is reversed, and the cause remanded to the Circuit Court of the United States for the Northern District of Illinois, with direction to remand the same to the City Court of Aurora, Kane County, Illinois."

The plaintiff, at no time after withdrawing his motion to remand and filing his additional counts, questioned the jurisdiction of the trial court, and this question was raised first and solely by the Court of Appeals itself when the case was being argued orally before that court.

A petition for writ of certiorari was filed by petitioner, the Chicago, Burlington & Quincy Railway Company, at the October Term, 1908, setting forth in substance the facts above stated, and the petition was granted and the writ issued, and this cause is now before the court for determination on the writ of certiorari so granted.

As to the facts of the case, and the correctness of the trial court in directing a verdict for the defendant, the case is well summarized in a few words by the opinion of the trial court, which appears at page 125 of the transcript.

The accident happened about 9 o'clock in the morning of January 3, 1906. There were three

tracks running in a generally easterly and westerly direction across the Harlem avenue crossing at the point of the accident. The tracks ran straight for three or four miles in each direction. The deceased lived a short distance from the crossing and was thoroughly familiar with it. He lived on the north side of defendant's tracks, and the Harlem avenue station of defendant was on the south side of the track, and on the east side of Harlem avenue. Deceased had been in the habit of catching a local train at Harlem avenue station every morning, to go to Hawthorne, Illinois, a station three or four miles east of Harlem avenue, where he worked for the Western Electric Company. The deceased knew that fast express trains, which did not stop at Harlem avenue crossing, were run over these tracks, and about the time in the morning that the accident happened. The south track, which was immediately next to the Harlem avenue station building, was the track that was used for east bound trains, that is, trains running to the City of Chicago. The north track was used for trains running west from Chicago to the City of Aurora and other westerly points. The middle track, upon which deceased was struck, was used for east bound trains in the morning and for west bound trains in the afternoon.

On the morning in question a street car drove up from the south to the south side of the right of way and tracks of the railroad company. This car stopped about fifty feet south of the south track. (Tr., 77.) Just about this time the local or "dummy" train, as it is sometimes called in the record, which stopped at Harlem avenue, pulled into the station from the

west on the south bound track, and stopped at the station with the rear end of the train 75 to 100 feet east of Harlem avenue. (Tr., 64.) After the local train pulled over the crossing, the conductor of the street car, whose name was John E. Sullivan (Tr., 70), walked out near the center of the crossing to see if any train was coming, and to flag his street car across the track. The local had gone by and the conductor walked about to the center of the center track and stood there. (Tr., 77.) The conductor heard the rumbling on the rails of the center track, and that attracted his attention. At this time Mr. Wellman, the deceased, was about 100 feet west of Harlem avenue crossing. He was then walking east in the north track. When this conductor first saw Wellman, the deceased, he, Wellman, lowered an umbrella, which he was carrying. He closed it and started on a run directly east in the west bound or north track until within 20 feet of the crossing, where he crossed diagonally across onto the center track where he was struck by the express train running east on the center track. The conductor had his eyes on him and the train all that time. (Tr., 70.) The conductor saw everything he did. The deceased never turned and looked around to the west to see if a train was coming on the center track, only at the time that he was struck. While Wellman, the deceased, was running east on the north or west bound track, and then over onto the center track, where he was struck, the train, which struck the deceased, was traveling along toward the highway behind deceased. The conductor saw Wellman long before he saw the train. While Wellman ran down the west

bound track towards Harlem avenue, the train hove in sight. (Tr., 79.) If Mr. Wellman had turned around when he was coming down the track, he could have seen this train which struck him. (Tr., 80.) The conductor shouted a warning to and waived his arms at the deceased, but the deceased did not heed it at all, and he was struck. (Tr., 80, 105.) Some claim was made that it was a rainy and misty morning, and somewhat foggy, but the conductor could see down the track a distance of 200 to 250 feet at least.

Mr. Dwight Kammerer, sat in the street car, which had pulled up and stopped at a distance, as he says, with the front end about 15 feet from the south rail. He sat in the street car reading his paper. After the street car stopped at the crossing, the local train came in on the south track and stopped at the station with the rear end 75 to 100 feet east of Harlem avenue. (Tr., 64.)

As the local pulled in, some smoke and steam blew around the car. It was there for an instant and disappeared very quickly. (Tr., 66.) This man, Kammerer, who sat in the street car, saw Wellman perfectly down the track to the west. When Kammerer first saw Wellman, the deceased, he was 15 or 20 feet away from the crossing. (Tr., 66.) It was a very bad morning and slightly rainy, but this witness stated you could probably see 600 or 700 feet. (Tr., 68.) He knew that you could see 100 feet easily enough. (Tr., 68.) There was no fog or smoke or anything else that obstructed the view of this witness of Wellman.

A man by the name of James Lane, was the motorman on the street car which stopped at the south side of the railroad right of way on the morning in question. He was running the car and was standing on the front platform. (Tr., 93.) It was a closed car and had open vestibules. This motorman saw Wellman when he was struck. At the time Wellman was struck he was about the middle of the crossing. The local or dummy train pulled in as the motorman reached the south side of the right of way. It was a disagreeable morning; there was some fog, and it was blowing. The wind was blowing from the east. The smoke from the local blew to the west. On cross-examination Mr. Lane stated that he stopped his car about fifty feet from the south rail of the south track. He stood there in the vestibule looking through the window. The local pulled in after he got to the point fifty feet south of the main track. It ran down and stopped at the Harlem station, perhaps 100 to 150 feet east of Harlem avenue. The rear end of the local was about 100 feet from Harlem avenue. When Mr. Lane first saw Mr. Wellman, the deceased, he, Wellman, was about 75 feet west of Harlem avenue. (Tr., 98.) At that time Wellman, the deceased, was either in the west bound track or right beside it. The local train had pulled by at that time. The local train was standing at Harlem avenue station, and then the witness looked down and saw Mr. Wellman. Wellman, when Lane first saw him, was walking, and then he started to run. When Lane first saw the deceased, he had an umbrella over his head, and then he lowered the umbrella and started to run. (Tr., 99.) Deceased

then ran down the north track; he ran all the time after he started to run. When the deceased got within 12 or 15 feet of the Harlem avenue crossing, he cut across diagonally, and the train, running from the west on the center track, struck him. They collided on the crossing about the center of the square formed by the street car track and the railroad track. The witness stated that he could see down the track 200 feet and perhaps further. The witness had no trouble at all in seeing all of Mr. Wellman's movements. While the motorman was standing in front of his car, Mr. Sullivan, the conductor of the car, was out on the crossing. (Tr., 100.) The motorman heard Mr. Sullivan shout a warning to the deceased. When Mr. Sullivan shouted at Mr. Wellman, Wellman was somewhere between the north and center tracks. The train was within 50 or 60 feet away. (Tr., 101.) The best judgment of the witness was that Wellman did not realize or hear the warning. The witness thought he did not know the train was coming. The witness, however, saw the train coming down the track. (Tr., 102.) He had his eyes on Wellman practically all of the time that he was running down there. He did not see him look back to see if a train was coming. He was watching him all the time. The distance between the tracks at the point in question was 14 or 15 feet. The train was a big express train with six or seven cars. (Tr., 102.) It made a good deal of noise when it approached the crossing, and the witness heard it; he knew it was coming. The express train was about 300 feet from Harlem avenue when the witness first discov-

ered it was approaching, and all that time Wellman was running on down towards Harlem avenue with his back to the train. There was no object of any kind between Mr. Wellman and the train. It was all perfectly open. (Tr., 103.) The conductor of the train, not only hollered at Wellman, the deceased, to give him a warning, but also made some gestures and motioned with his hand. (Tr., 105.)

A reading of the transcript will fully support the short, clear and succinct summary of the case as stated by the court at the conclusion of plaintiff's evidence. The evidence discloses that the deceased practically ran into a train, which he must have seen had he looked. The witnesses all heard it approaching and saw it, and the conductor, who stood on the center of the crossing for the purpose of flagging a street car across, saw it and endeavored to shout a warning to the deceased, and waved his arms to him in an endeavor to stop the deceased while he was running toward the crossing. Had the deceased stopped, looked or listened as required by the law of this court, he must have become aware of the approach of the train, and thus have avoided injury. It is a clear case of contributory negligence. On the merits we submit that the trial court was clearly right in directing a verdict on the ground of contributory negligence.

The errors assigned in this court are as follows:

1. That the Circuit Court of Appeals erred in holding that the trial court, to-wit: the Circuit Court of the United States for the Northern District of Illinois, did not have jurisdiction of said cause.

2. Said Circuit Court of Appeals erred in reversing the judgment of the Circuit Court and remanding the same to the said Circuit Court with directions to remand the same to the City Court of Aurora, Kane County, Illinois.

3. The said Circuit Court of Appeals erred in not sustaining the jurisdiction of the Circuit Court and affirming the judgment of said Circuit Court.

4. The said Circuit Court of Appeals should have affirmed the judgment of the trial court.

BRIEF OF ARGUMENT.

I.

THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS HAD FULL AND COMPLETE JURISDICTION OF SAID CAUSE, AND THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT SAID COURT DID NOT ACQUIRE JURISDICTION, AND IN REVERSING THE JUDGMENT OF THE TRIAL COURT, AND ERRED IN NOT AFFIRMING THE JUDGMENT OF THE TRIAL COURT.

The petition for removal charged that the plaintiff had joined as a defendant a corporation, out of which it was inconceivable that the plaintiff expected to make the amount of his judgment. The Chicago, Burlington & Quincy Railroad Company, the Illinois corporation, had parted with all of its property and assets for a period of 99 years, except the right of the latter to exist as a corporation, and the franchise of a corporation under the laws of the State of Illinois, is not subject to levy and sale under an execution. *Hatchen* v. *T. W. & W. Ry. Co.*, 62 Ill., 477. The removing defendant necessarily concluded from the situation that the plaintiff did not expect to make the amount of a possible judgment of $10,000 out of the Illinois corporation; that it was a mere nominal defendant and that the purpose of joining the Illinois corporation was to defeat the right of the Iowa corporation to remove the cause to the United States Circuit Court. A proper petition and bond were filed, and an order was entered

by the State Court, removing the cause to the Circuit Court with directions to the clerk to transmit the record. The plaintiff in the cause, upon filing of the transcript in the United States Circuit Court, entered a motion to remand the case to the City Court of Aurora, Kane County, Illinois. When the motion came on to be heard, the plaintiff did not stand upon his motion, but withdrew it and asked leave to amend his declaration by filing additional counts instanter, which leave, upon his application, was granted, and he took a rule upon the defendant to plead to the said amendments within ten days. Additional counts were filed pursuant to the leave granted and thereafter the defendant filed a plea of the general issue. The case was called for trial; the parties selected the jury, which was to pass upon their rights, and the plaintiff offered his evidence in support of his cause of action, and at the close of his evidence the court directed a verdict in favor of the defendant. The plaintiff did not controvert or take issue in any manner upon the allegations or the removal petition, but on the contrary took the course that we have outlined above. At no stage of the proceedings, from the time that plaintiff withdrew his motion to remand and filed his additional counts, did he question the jurisdiction of the trial court or the Court of Appeals. The question of the jurisdiction of the trial court was not raised by the plaintiff at all. It was raised by the Court of Appeals upon its own motion when the case was being argued before that tribunal. It was the duty of the plaintiff, when the motion to remand came on for hearing, in some manner to controvert or take issue with the allegations

of the petition, and by his failure so to do, and by his withdrawal of his motion to remand and asking leave to file additional counts in the case, and afterwards filing such additional counts, he conclusively admitted the jurisdiction of the Federal Court. The Circuit Court of Appeals in this case apparently refused to give any force or effect to the course which the plaintiff took, and the opinion of the Court of Appeals in this case, which appears at page 146 of the transcript, is at variance with any number of cases in the other Circuit Courts and Courts of Appeal. These cases, some of which we cite below, are practically unanimous in holding that it is the duty of the plaintiff, upon the removal of a case by a defendant, to controvert or take issue with the allegations of the petition, and if he fails so to do the cause stands removed, and the jurisdiction of the Circuit Court attaches.

In the case of *Atlantic, etc., R. R.* v. *Southern Ry. Co.*, 153 Fed., 122, it is said:

> *"The reason why this ground for objecting to the jurisdiction was not earlier made seems to be found in the fact that the Knoxville & Augusta Ry. Co. is a defunct corporation, whose railroad was long since sold to the Southern Ry. Co., and has since been operated by the latter corporation.* This fact was stated in the petition for removal, and the existnece of any such corporation as the Knoxville & Augusta R. R. Co. denied. *That petition further averred that the complainant had named the extinct company as a defendant 'improvidently and improperly and for the purpose of attempting to prevent and interfere with your petitioner's rights of removal,' etc., 'and of fraudulently interfering with the legal jurisdiction of said*

United States courts over this proceeding.' No isue was ever made upon this averment, and the motion to remand was upon other grounds. Averments of fact in a petition to remove, in the absence of some denial by answer or by comparison with the record, must be taken as admitted, and, if sufficient upon their face to justify a removal, all other questions out of the way, will entitle the Circuit Court to maintain its jurisdiction. Dishon v. *C. N. O. & R. Co.*, 133 Fed., 471, 474; 66 C. C. A., 345."

The only difference between the case above referred to and the case at bar is that it was set up in the petition in that case that the plaintiff had joined a company that had sold its railway and assets to another company, and in this case the petition charges that the company had parted with all of its property for a period of 99 years, except its right to exist as a corporation, and under the laws of the State of Illinois a franchise to be a corporation is not subject to sale under an execution.

In *Kelly* v. *C. & A. Ry. Co.*, 122 Fed., 286, which was an action against a lessee and a lessor, the court, at page 289 of that volume, said:

"Even where the petition stating the cause of action, on its face, presents a joint liability between a resident and non-resident defendant, it may nevertheless be shown in the petition for removal that in fact no cause of action exists against the resident defendant, and that his joinder as a co-defendant was for the purpose of defeating the removal of the cause, and where this allegation of the petition for removal is supported by proofs, as by affidavits, it devolves upon the plaintiff to take issue upon this fact, which issue shall be tried by the United States Court, *and, if the plaintiff fail to controvert such petition and affidavit, the allegations of the*

petition for removal stand admitted. Ross v. *Erie R. Co. et al.* (C. C.), 120 Fed., 703; *Dow* v. *Bradstreet Company et al.* (C. C.), 46 Fed., 824, 827, 828; *Durkee* v. *Illinois Central R. R. Co.* (C. C.), 81 Fed., 1; *Prince* v. *Ill. Cent. R. R. Co.* (C. C.), 98 Fed., 1; *Arrowsmith* v. *N. & D. R. Co.* (C. C.), 57 Fed., 170."

In *Ross* v. *Erie R. R. Company,* 120 Fed., 703, on page 704, the court says:

> "The averments in the petition in the action at bar are the unwarranted association of the Erie Railroad Company with the coal company, for the purpose of preventing removal of the action. *If the plaintiff disclaimed these allegations, he should have joined issue upon the facts alleged or at least controverted the same. But no evidence is offered repelling either the alleged facts or the accusations, and, within the practice of the court, it must be accepted as true.*"

In *Durkee* v. *Illinois Central Railroad Company,* 81 Fed., 1, on page 2, Judge SHIRAS says:

> "Under the views expressed in that case, which I now see no reason to change, it is open to the plaintiff to join issue upon the facts alleged in the petition for removal, which are relied on as showing that the Cherokee & Dakota Company must be held to be merely a nominal party, and, if issue is joined, the court will hear the evidence thereon; *but unless issue is thus made on this question, the allegations of the petition, being supported by affidavit, will be taken to be true, and in that event it must be held that the case was properly removed into this court.*"

In the case of *Dishon* v. *C. N. O. & T. P. Ry. Co.,* 133 Fed., 471, commencing on page 475, the Court of Appeals for the Sixth Circuit said:

> "Conceding that the intent with which a party

is made defendant is not material, where a cause of action exists, and the defendant is brought into court in good faith, with the intention of keeping him there and prosecuting the case against him to a conclusion it is settled that where a person is made a defendant for the sole purpose of preventing the removal of the case to the United States Court, and without any intention of prosecuting the case against him, the court will consider him a merely nominal or sham defendant—made so for a fraudulent purpose—whose presence in the case can be ignored.

The averments of the petition for removal were not simply demials of the allegations of the plaintiff's petition. They were affirmative in form and substance. They charged a case of fraudulent joinder. If, as they alleged, Coffman did not in any sense contribute to the death of the plaintiff's intestate—if the plaintiff knew this fact, and, although Coffman was not a citizen of Kentucky, made him a party defendant for the sole purpose of defeating the removal of the case to the United States Court—a case for removal, regardless of Coffman's nominal presence, was presented. If these averments were not true, the plaintiff should have denied them, and an issue would them have been made for the court below to try and determine. No answer was filed, no issue in any other way was taken."

This case is cited approvingly by your Honors in *Kentucky* v. *Powers*, 201 U. S., 1, 34.

In *Dow* v. *Bradstreet Co.* (C. C.), 46 Fed., 824, it was held that a co-defendant joined for the mere purpose of preventing a removal might be regarded by the Federal Court as a merely nominal party; Judge SHIRAS saying:

"To properly present the question, the alle-

> gations of fact relied on as showing the fraudulent joinder of the party should be made in the petition for removal, unless they otherwise appear upon the face of the record. If the facts alleged, if true, make out the charge of fraudulent misjoinder of parties for the purpose named, and the other party desires to take issue upon the truth thereof, then the trial thereof must be had in the Federal Court." Citing cases.

In *Durkee* v. *Ill. Cent. R. Co.* (C. C.), 81 Fed., 1, the petition for removal alleged that one of the defendants was joined for the sole purpose of defeating the jurisdiction of the Federal Court; and it was held that, no issue being taken, the facts alleged in the petition, which was supported by affidavit, would be taken as true, and the motion to remand overruled. It was open to the plaintiff to join issue upon the facts alleged in the petition for removal. If he did not, "the allegations of the petition, being supported by affidavits, will be taken as true." There was a motion to remand, but it was held it did not operate as a denial of the allegations of the petition for removal.

In *Kelly* v. *Chicago, etc., Ry. Co.* (C. C.), 122 Fed., 286, Judge PHILIPS said (page 289):

> "Even where the petition stating the cause of action on its face presents a joint liability between a resident and a non-resident defendant, it may nevertheless be shown in the petition for removal that in fact no cause of action exists against the resident defendant, and that his joinder as a co-defendant was for the purpose of defeating the removal of the cause, and that where this allegation of the petition for removal is supported by proofs, as by affidavits, it de-

volves upon the plaintiff to take issue upon this fact, which issue shall be tried by the United States Court, *and, if the plaintiff fail to controvert such petition and affidavit, the allegations of the petition for removal stand admitted.*" *Ross* v. *Erie R. Co.* (C. C.), 120 Fed., 703; *Dow* v. *Bradstreet Co.* (C. C.), 46 Fed., 824; *Durkee* v. *Ill. Cent. R. Co.* (C. C.), 81 Fed., 1; *Prince* v. *Ill. Cent. R. R. Co.* (C. C.), 98 Fed., 1; *Arrowsmith* v. *N. & D. R. Co.* (C. C.), 57 Fed., 170.

In *Weaver* v. *Northern Pacific R. Co.* (C. C.), 125 Fed., 155, Judge KNOWLES says:

"Where the petition for removal states jurisdictional facts such as citizenship, etc., which are not true, the plaintiff may traverse these facts by allegations in the nature of a plea in abatement, and the court can receive evidence to determine the same." Dillon's Removal of Causes, 158, Note 4.

* * * * *

"The undenied allegations of the petition for removal, taken in connection with the fact that Coffman had not been served and no attempt was being made to serve him, and no explanation of the failure to serve him was given, amply justified the court, in our opinion, in refusing to remand the case."

In *Railway Company* v. *Ramsey*, 22 Wallace, 322, the railway company after trial attempted to raise the question of the jurisdiction of the Circuit Court in a case which had been removed. The case is somewhat analagous to the case at bar, although the facts in the present case are stronger in favor of the jurisdiction of the trial court than in the Ramsey case. In the latter case there was a stipulation that the cause "was brought to the Circuit Court" by trans-

fer from the State Court. All the files had been destroyed in the great fire. The stipulation had reference to the pleadings alone. This court sustained the jurisdiction, saying:

> "Neither party seems to have considered anything else was necessary. Each, apparently admitting jurisdiction, seemed anxious to get ready for trial. * * * Consent of parties cannot give the courts of the United States jurisdiction, but the parties may admit the existence of facts which show jurisdiction, and the courts may act judicially on such an admission. Here the parties have put into the record their joint admission that the cause was transferred to the Circuit Court from a State Court and that the evidence of the transfer which was once among the files had been destroyed. They have asked the court to act upon this admission and proceed with the cause. The court did proceed. * * * Either party upon the filing of the papers could have moved to remand, or the court itself, without a motion could have sent the case back if the jurisdiction did not appear. *As both the court and the parties accepted the transfer it cannot be doubted that the files did then contain conclusive evidence of the existence of the jurisdictional facts.*"

The application of the foregoing language of this court is obvious. In the case at bar all parties accepted the transfer and proceeded to trial without any objection whatever.

The Court of Appeals in its opinion in the case at bar says that the failure to press the motion to remove, or other proceedings in the Federal Court, after removal, are without force to enlarge the statutory authority of the Federal Court in causes so brought, and in effect holds that no matter what the

plaintiff might do by amended declaration or otherwise, the Circuit Court did not acquire jurisdiction. It is not a question of enlarging the statutory authority of the Federal Court. It is a question of whether the jurisdiction of the Federal Court in this case attached to this cause by reason of the course of the plaintiff. It is a question, not of enlarging the jurisdiction of the Federal Courts, but whether or not the plaintiff did not concede, by his course, the jurisdiction of the Federal Court. The case of *Davies* v. *Lathrop,* 15 Fed., 565, which quotes the case of *Ry. Co.* v. *Ramson,* 22 Wallace, 322, is so closely in point that we are constrained to quote somewhat at length from the opinion by Judge Wallace. His opinion is as follows:

> "The plaintiffs having brought this action in the State Court, the defendant removed it into this court upon a petition alleging the plaintiffs to be citizens of the State of New York and the defendant to be a citizen of the State of New Jersey. *The case was tried in this court and resulted in a verdict for the defendant.* The plaintiffs *now move to remand the action to the State Court upon the ground that, in fact, one of the plaintiffs was and is a citizen of the same state with the defendant.* Concededly, the controversy not being a divisible one, the defendant was not entitled to remove the cause originally, and had a motion been made by the plaintiffs before the trial of the case the motion must have prevailed. *The question now is, however, whether the plaintiffs, by their conduct, have not lost their right to have the action remanded. If it can be lost by waiver in any case, it has been lost here.* It is not asserted that the defendant knew or had reason to suppose that either of the plaintiffs was a citizen of the same state with himself. It is therefore to be as-

sumed that he acted in good faith in removing the cause, but was mistaken as to a fact which was peculiarly within the knowledge of the plaintiffs. *The plaintiffs, knowing the truth, chose, instead of moving to remand,* and thereby correcting the mistake, *to permit the defendant to incur the burden of a trial.* Apparently they concluded to take the chances of trial, with the view of remaining silent if it should result favorably, but of springing the objections if it should result adversely. Such practice will not be willingly tolerated, because it is unjust to the party who has been subjected to the expense of a futile trial, and because it imposes upon the court the labor of a nugatory proceeding. Unless the inflexible rules which require courts to entertain jurisdictional objections whenever urged must control, *it should be held that plaintiffs have waived their right to assert now what good faith and a just regard to decorous procedure required them to assert before the trial of the action.* Authorities are not wanting to the effect that a party may waive his right to insist that the court has not jurisdiction over the controversy because of the status of the parties; and these authorities address themselves to the precise point here, and decide that a party will not be permitted to show that the plaintiff and defendant are citizens of the same state in order to oust the jurisdiction of the court, unless he has availed himself of the right to do so by conforming to established rules of practice. *Thus, a defendant will be precluded from showing this fact upon the trial when he has omitted to raise the point by a plea to the jurisdiction.* He waives it by answering to the merits. *D'Wolf* v. *Rabaud,* 1 Pet., 476; *Evans* v. *Gee,* 11 Pet., 80; *Sims* v. *Hundley,* 6 How., 1; *Sheppard* v. *Graves,* 14 How., 505; *Sobrey* v. *Nicholson,* 3 Wall., 420;

As is said by Chief Justice Waite in *Ry. Co.* v. *Ramsey,* 22 Wall., 322:

'Consent of parties cannot give the courts of

the United States jurisdiction, but the parties may admit the existence of facts which show jurisdiction, and the courts may act judicially upon such an admission. *The cases referred to show that the admission may be implied from the acts or omissions of parties, and is as effectual when so implied as though explicitly stipulated.'*

Upon analogy and principle it should be held that *the party loses his right to object to the removal of an action, when it has been removed on the ground of the diverse citizenship of parties by going to trial and trying the cause without raising the objection.*

Althought Section 5 of the Act of Congress of March 3, 1875, regulating the removal of causes, among other things, directs the remanding of a cause if it shall be made to appear at any time that it does not really and substantially involve a controversy properly within the jurisdiction of the Circuit Court, the context indicates that the provision is intended to apply only to causes which have been collusively removed. The section was evidently intended to protect parties and the Circuit Courts from an abuse of the federal jurisdiction, by transferring to these courts controversies which are only colorably and not 'really and substantially' those of federal cognizance. Cases may arise where the real character of the controversy is not made manifest until the trial. The section is 'for the protection of the court as well as the parties against fraud upon its jurisdiction.' *Williams* v. *Town of Ottawa,* Sup. Ct. Octo. term, 1881. It should not be construed to apply to a case like this, where the removal was not collusive, and where the party now objecting by his conduct has admitted that the court has jurisdiction to hear and determine the cause. The motion is denied.''

In the Davies case, *supra,* the plaintiff made no

motion to remand, but waited until after the trial, and then raised the question of jurisdiction. In the case at bar, the plaintiff made a motion to remand but withdrew it, and then filed additional counts in the Circuit Court, and asked the Circuit Court to try his case. The plaintiff was the actor in the case at bar in the Circuit Court. He asked the Circuit Court to proceed in the cause and asked and obtained a rule upon the defendants in that court, and compelled them, to plead to his amended declaration. He proceeded to trial, and he was in no position to assert that the Federal Court did not have jurisdiction of his case, and we submit that the Court of Appeals is in no position to say it for him.

In *Carrington* v. *Florida R. R. Co.*, 9 Blatchford, 467, the cause was removed and the plaintiff filed an amended declaration in the Circuit Court after the removal, and sometime thereafter moved to remand the cause upon the ground that it had been improperly removed, and the court refused to do so, saying:

> "This action was originally commenced in the Supreme Court of the State of New York, and is now upon the docket of this court, by virtue of proceedings taken to remove it, as against two of the defendants, from the State Court to this court, in pursuance of the Act of Congress of July 27, 1866. (14 Stat., 306.) It now comes before the court upon a motion made by the plaintiff to remand the cause to the State Court, upon the ground that it is of such a nature as not to be within the scope of the act of 1866, it being, however, admitted, that the defendants are citizens of another state.
>
> It appears to me a sufficient answer to this

motion to say, that it is made to appear, that, after the record of removal was filed in this court, *the plaintiff pleaded anew in this court*, and, in his bill, set up the removal of the cause into this court as having been effected by the proceedings taken by these defendants, *without any suggestion that the case was not removed, and properly so. The case is now at issue in this court, upon the plaintiff's bill filed here, and the answer and demurrer of the defendants; and it is too late now for the plaintiff to ask that the cause be remanded, on motion.* The motion to remand is denied."

In *Edgerton* v. *Gilpin*, 3 Woods, 277, the cause was removed from the State Court of Texas to the Circuit Court for the Eastern District of Texas, and the parties proceeded with the litigation in that court without objection, and then a motion to remand was made. The court, in an opinion by the late Justice Bradley, who evidently was then upon the Circuit, said:

"The statements (of the removal petition) as to the citizenship of the parties have never been denied. * * * *The parties* have acquiesced in the removal for years, and *have been proceeding with the litigation of the cause in this court without objection.* Every ground of objection to the jurisdiction had been removed. *We think the parties are entirely estopped from removing the remand at this stage.*"

If the verdict and judgment in this cause had gone against the removing defendant, could it have been contended for a moment by it that the Circuit Court of the United States did not have jurisdiction of this case? If a verdict and judgment had been rendered against the removing defendant, could the removing defendant then have suggested the want of

jurisdiction and obtained a reversal of the judgment and an order remanding of this case to the State Court on the ground that the Circuit Court did not acquire jurisdiction? Most assuredly not. If the defendants had been in that situation and suggested the want of jurisdiction we would have been confronted by repeated decisions of this court that by removing the cause and proceeding to trial we had conceded the jurisdiction of the court and were estopped from raising any question concerning the jurisdiction of the court. Such are the holdings of this court in *Baggs* v. *Martin*, 179 U. S., 206; *In re* Moore, 209 U. S., 490.

And in this case it is to be borne in mind that not less than eight of the additional counts charged distinct acts of negligence against petitioner of which counts the Circuit Court might have taken original cognizance in the identical form in which they were filed.

That being the rule of law which is applied to a removing defendant, why, in justice, is not the same rule applicable to a plaintiff, who, after the removal of the cause, files additional counts in his declaration and proceeds with the trial of his case without any objection whatever, and at every step proceeds as though the trial court did have complete jurisdiction of the parties and subject matter.

The case of *In re* Moore, 209 U. S., 490, is applicable to the case at bar. In that case, the plaintiff, who was a citizen of the State of Illinois, commenced suit in the State Court of Missouri against the Louisville & Nashville Railroad, which was a citizen of the State of Kentucky. A petition for re-

moval was filed by the defendant railroad company. The case was one which was not removable, but this court held that the trial court had obtained jurisdiction by the conduct and acquiescence of the parties.

Your Honors, speaking through the late Mr. Justice Brewer, said:

> "That the defendant consented to accept the jurisdiction of the United States court is obvious. It filed a petition for removal from the State to the United States court. No clearer expression of its acceptance of the jurisdiction of the latter court could be had. After the removal the plaintiff, *instead of challenging the jurisdiction of the United States court by a motion to remand, filed an amended petition in that court, signed a stipulation giving time to the defendant to answer, and then both parties entered into successive stipulations for a continuance of the trial in that court. Thereby the plaintiff consented to accept the jurisdiction of the United States court, and was willing that his controversy with the defendant should be settled by a trial in that court. The mere filing of an amended petition* was an appeal to that court for a trial upon the facts averred by him as they might be controverted by the defendant. And this, as we have seen, was followed by repeated recognitions of the jurisdictions of that court."

Your Honors will note that this court held that the filing of an amended petition was an appeal to the Circuit Court for a trial upon facts averred by the plaintiff. Your Honors, in the Moore case, held that the plaintiff by filing his amended petition and stipulating to give time to the defendant to answer, and stipulating for continuances of the trial, thereby consented to accept the jurisdiction of the Circuit

Court of the United States, just as we insist in the case at bar that the plaintiff, by the withdrawal of his motion to remand, and his course in filing additional counts to the declaration, and taking all the steps during the trial, filing motion for new trial, and doing everything that was necessary to be done in the ordinary course of procedure, consented to accept the jurisdiction of the Circuit Court. We submit that by these acts the Circuit Court did acquire jurisdiction notwithstanding the assertion of the Court of Appeals, in its opinion, that the withdrawal of plaintiff's motion to remand and filing amended declaration, and other steps amount to nothing. This leads us to the point of calling Your Honors' attention to the fact that everyone of these additional counts, except possibly Additional Count No. 5, could have been filed as an original declaration in the Circuit Court of the United States at Chicago, and would have been absolutely good counts against the removing defendant, this petitioner, had it been sued in the Circuit Court in an original suit. In other words these additional counts charge acts of negligence solely by the Chicago, Burlington & Quincy Railway Company and of which the Circuit Court could have taken original cognizance and jurisdiction. If Your Honors will turn back to the summary that we made of these nine additional counts, you will there find that in some counts it is stated by way of recital that there was a lease by the Railroad Company to this petitioner, and in some others that this petitioner was operating a road of the other company, and without any statement by way of lease, and then they charge that this petitioner, the Chi-

cago, Burlington & Quincy Railway Company, did this or that act of negligence, by means whereof plaintiff's intestate met his death. Everyone of these counts, except as we have stated, No. 5, avers acts of negligence upon the part of this petitioner, solely, and everyone of them just as drafted, except perhaps Count 5, might have been filed in an original suit in the Circuit Court, and they stated perfectly good causes of action in that court. *Arrowsmith* v. *R. R. Co.*, 57 Fed. Rep., 165, 178, 179. They would be held *in the Circuit Court of Appeals in the 7th Circuit* to state perfectly good causes of action in the United States Circuit Court of Illinois against this petitioner. *Hayes* v. *Northern Pacific Ry. Co.*, 74 Fed. Rep., 279, 283.

Under these circumstances and the decisions above cited, was the Court of Appeals justified in holding that the Circuit Court did not have jurisdiction and authority to try this case? If the verdict and judgment had gone against this petitioner, it would not have been heard for a moment to urge that the trial court did not have jurisdiction of the case, and we respectfully submit that justice requires that the same rule of law be applied to a plaintiff as to a defendant.

For the reasons indicated, we respectfully contend that the Court of Appeals erred in holding that the trial court did not have jurisdiction to try the case, and erred in reversing the judgment with directions to remand the cause to the State Court. We ask this court to reverse the judgment and order of the Court of Appeals and to affirm the judgment of the trial court. In asking this court to affirm the judg-

ment of the trial court upon the merits, we do so because plaintiff's intestate was clearly guilty of such contributory negligence under the rules of law laid down by this court, and other Federal Courts, as precludes any recovery by the plaintiff.

II.

PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE IN FAILING TO STOP, LOOK AND LISTEN, AND THE JUDGMENT OF THE TRIAL COURT WAS CLEARLY CORRECT IN DIRECTING A VERDICT IN FAVOR OF THE DEFENDANTS.

The verdict in this case was directed at the close of plaintiff's evidence, so there is no question of any conflict in the evidence. The court directed the verdict on the evidence introduced by the plaintiff himself.

The deceased did not stop, look and listen before attempting to cross the track upon which he was killed. There is no question about this. Harlem avenue crossing in Berwyn was the scene of the accident. It was a public highway that existed for many years. A single street car track was built across the highway and crossed the tracks of the defendant at the point of the accident. The defendant railroad companies had three tracks across Harlem avenue. The north track was the west bound or main track. It carried trains running from Chicago. The south track was the east bound track and carried the trains that ran into Chicago. The center track upon which deceased was killed, was used in the morning for east bound trains and in the after-

noon for west bound trains. The deceased lived not far from the scene of the accident, perhaps two or three blocks, and he was in the habit of catching a train for his work every morning at the Harlem avenue station, which was situated on the south of the tracks and at a point about 100 feet east of Harlem avenue. The tracks for a number of miles both east and west run perfectly straight. The deceased, sometimes traveled on a train that left Harlem avenue at 8:41 in the morning, and Mr. Wellman, the deceased, while waiting at the Harlem avenue station for the 8:41 local train, had seen the express train going through, and (Tr., 84) Mr. Motter, a witness, while with deceased had seen the express train go through before the local on occasions, ten minutes before the local train pulled in, so that the deceased knew that express trains ran on the center track, and as Mr. Motter, one of his friends, stated, the deceased had seen these trains go through Harlem avenue station without stopping. The record shows that the deceased knew as much about the crossing as anyone possibly could know.

The accident happened shortly before 9 o'clock on the morning of January 3, 1906. It was a rainy or drizzly morning, and some of the witnesses stated it was more or less foggy, but one could see objects distinctly variously estimated by the witnesses at distances of from 200 to 600 or 700 feet.

Shortly before the accident occurred, a street car running up the street car track in Harlem avenue, drove up to the south side of the right of way, and as the motorman says, stopped at a distance

of about fifty feet from the south rail of the south track. The conductor then proceeded to about the center of the crossing to ascertain whether there were any trains approaching and to flag his car across the crossing. The conductor states that at this time he could hear the rumbling of the train, and just about this time he saw Mr. Wellmen coming down the north track in an easterly direction toward Harlem avenue crossing, with an umbrella over his head. The local train, which was on the south track, had pulled into the Harlem avenue crossing, just about the time the street car stopped south of the track. The local train ran east of Harlem avenue and stopped at Harlem avenue station with the rear end of the train about 100 feet east of Harlem avenue. The conductor states that after lowering his umbrella, the deceased started to run along the west bound track and while doing so, the express train running on the center track hove in sight, and that it was making a loud rumbling noise. The deceased continued to run until within 15 or 20 feet of the crossing, when he cut diagonally across from the north track to the center track, where he collided with the engine of the express train at about the center of a square formed by the street car and the center railroad track. The conductor shouted to the deceased, and waived his hands at him to give him a warning, but they were not heeded, and deceased met his death. The motorman also saw the deceased running down the track, and a passenger in the street car also saw him. The motorman, James Lane, also testified that the conductor hollered at the deceased,

and that he also motioned to the deceased with his hands as he was running towards the crosing, but deceased never looked back from the time he started to run to see whether a train was coming. The evidence is conclusive that the plaintiff did not stop, look and listen to ascertain whether a train was approaching before running onto this track. Under these circumstances, we submit, under principles of law that are absolutely settled, that the failure of the deceased to look and listen before crossing the track, precludes any recovery.

We give below some quotations from this court and other Federal Courts holding that the failure to look and listen absolutely precludes a recovery, and the court, under such circumstances, should direct a verdict in favor of a defendant.

> "He did not look, or if he looked, he did not heed the warning and took the chance of crossing the track before the train could reach him. In either case he was guilty of contributory negligence."
>
> *Nor. Pac. R. R. Co.* v. *Freeman,* 174 U. S., 379-384.

> "If plaintiff had looked with any care he would have seen the train. It was there; his presence upon the track and the collision were practically simultaneous. * * * He actually stepped immediately in front of the moving train. If plaintiff had listened attentively, he would also have heard the approaching train before he took the two unfortunate steps. Common knowledge tells us that a train of cars drawn over a railroad track by a ninety-ton engine at a rate of fifty miles an hour makes a great noise, and that even a strong wind not of extraordinary or unusual velocity of force

does not render it possible for such a train to come unexpectedly upon one who possesses a good sense of hearing and is reasonably employing it for his protection under circumstances which otherwise permitted its free use. That plaintiff, in possession of good sight and hearing, could have looked and listened and not have seen or heard the train which must have been in plain view and making a great noise is contrary to all reasonable probability, in opposition to the physical fact and impossible of belief. In these circumstances his testimony that he looked and listened is entitled to no credence and does not create a conflict in the evidence." (Citing a number of cases.)

C. & N. W. Ry. v. *Andrews,* 130 Fed., 65, 71.

"If he looked, he could but see. If he did not see the light he was not looking. In either event the physical fact concludes him."

C., M. & St. P. Ry. Co. v. *Clarkson,* 147 Fed., 397, 405.

"It is the duty of every one who approaches it, to look both ways and to listen before crossing its tracks, and when a diligent use of the senses would have avoided the injury, a failure to use them is under ordinary circumstances contributory negligence, and should be so declared by the court. Where contributory negligence is established by the uncontroverted facts of the case, it is the duty of the trial court to instruct the jury that the plaintiff cannot recover. * * * The questiin is, as hereinbefore stated, did the negligence of Rossow directly contribute to his death? If it did, defendant in error cannot recover, even though plaintiff in error was also negligent."

C., St. P., M. & O. v. *Rossow,* 117 Fed., 491.

"It can never be assumed that cars are not approaching on a track or that there is no danger therefrom. The law requires of one going into so dangerous a place, the diligent exercise of his faculties of sight and hearing at such short distance therefrom as will be effectual for his protection. If this duty is neglected and injury results, there can be no recovery, although the injury would not have occurred but for the negligence of others."

Chicago Great Western Ry. Co. v. *Smith*, 141 Fed., 930.

"The rule is well established that it is the duty of a traveler to stop and look and listen before crossing or walking along a railroad track. He has no right to assume at any time of the day or night that trains will not be run over the track. * * * The track itself as it seems necessary to iterate and reiterate is itself a warning. It is a place of danger; it can never be assumed that cars are not approaching on a track or that there is no danger therefrom. * * * *It is no excuse for his failure to take such precautions that the wind is blown in his face or that the noise of a waterfall may have deadened the sound of an approaching train. Those circumstances only rendered the use of his senses the more imperative.* It was his duty continually to exercise vigilance."

Northern Pacific Ry. v. *Jones*, 144 Fed., 50.

"But one explanation of his conduct is possible, and that is that he went upon the track without looking to see whether any train was coming. Such omission has been again and again, both as to travelers on the highway and employes on the road, affirmed to be negligence. The track itself, as it seems necessary to iterate and reiterate, is itself a warning. It is a place

of danger. It can never be assumed that cars are not approaching on a track or that there is no danger therefrom. It may be, as is urged, that his motive was to assist in getting the handcar out of the way of the section moving on the siding, but whatever his motive, the fact remains that he stepped on the track in front of an approaching train without looking or taking any precautions for his own safety."

The court held that the deceased was guilty of contributory negligence.

Elliott v. *C., M. & St. P. Ry. Co.*, 150 U. S., 245-248.

"The failure of the engineer to sound the whistle or ring the bell did not relieve the deceased from the necessity of taking ordinary precaution for her safety. Negligence of the company's employes in these particulars was no excuse for negligence on her part. She was bound to look and listen before attempting to cross the railroad track in order to avoid an approaching train and not to walk carelessly into the place of possible danger. Had she used her senses she could not have failed both to hear or to see the car that was coming. If she omitted to use them and walked thoughtlessly upon the track, she was guilty of culpable negligence and so far contributed to her injury as to deprive her of any right to complain of others. If, using them, she saw the train coming and yet undertook to cross the track instead of waiting for the train to pass and she was injured, the consequences of her mistake and temerity cannot be cast upon the defendant. No railroad company can be held liable for a failure of experiments of that kind."

Mr. Justice FIELD in *Railroad Company* v. *Houston*, 95 U. S., 697-702.

The above case is cited with approval and with the further statement that when the evidence given at the trial with all the inferences which the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict if returned must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant.

Schofield v. *C., M. & St. P. Ry. Co.*, 114 U. S., 615-618.

It has been urged before, and may be urged in this court, that the fog obstructed the view more or less of the deceased. The fog did not interfere with the conductor and motorman in learning of the approach of the train, and objects could easily be seen at a distance, variously estimated, of from 200 to 600 feet. The conductor of the street car, who stood on the crossing, attempted to save the life of deceased by shouting to him and waving his arms. If the deceased had looked around at that time, he would have discovered the approach of the train, and probably would have stopped and saved his life, but he failed to heed the warning and met his death. The fog, whether of more or less density, only called for greater vigilance upon the part of the deceased, and did not warrant him in becoming more careless of his safety.

In *C., B. & Q. R. R. Co.* v. *Munger*, 168 Fed., 690, it was urged that there was more or less fog, and that that excused the deceased from the exercise of care, but the court held otherwise, and at page 692 said.

"From a point about 65 feet north of the main track continuously down to the crossing, all the railroad track extending for a quarter of a mile east of Lindell avenue, was, except for a heavy and dense fog which prevailed that morning, in open and plain view to any pedestrian going south on Lindell avenue. There were no natural or artificial obstructions to prevent hearing or seeing an approaching train. The decedent reached the track and stepped upon it so immediately in front of the approaching engine that he, although walking fast, was struck and killed before crossing the track, which, as is well known, is not over four or five feet wide. Several witnesses standing near to the crossing testified that the noise of the approaching train which ran over decedent was heard by them for a minute or more before it reached the crossing as some put it, or when the engine was helf a mile away as others put it. The fog was unusually heavy that morning, but so that an engine could be ascertained a distance variously estimated from about 50 to 200 feet. So much for the uncontroverted facts of the case. * * * On the foregoing state of facts there can be no doubt, apart from the effect to be given to the fog of the morning the decedent was guilty of contributory negligence fatal to recovery by his widow in this action. He rapidly approached a much operated railroad track, stepped upon it, undertook to pass over it, and was overrun by an engine before he was able to get across. The physical facts conclusively show that either he did not look and listen for an approaching train, or that, if he did so, he understook to cross in front of an immediately threatening danger, whihc he must have both seen and heard. In the one case he was guilty of inexcusable negligence, and in the other of inexcusable recklessness. In either, according to well settled authority, he was guilty of such contributory

negligence as precludes recovery in this action. (Citing authorities.)

Does the heavy fog which prevailed that morning modify this result? The following authorities we think conclusively answer this question in the negative."

The application of the foregoing quotation from the decision of the Court of Appeals for the Sixth Circuit to the facts of the case at bar is so clear as to require no comment from us.

In conclusion we respectfully urge that the Circuit Court of Appeals erred in rendering the judgment that it did, that the judgment of the Circuit Court of Appeals should be reversed, and that of the trial court affirmed.

Respectfully submitted,

ALBERT J. HOPKINS,
Attorney for Petitioner.

CHESTER M. DAWES,
Of Counsel.

No. 105.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1910.

CHICAGO BURLINGTON & QUINCY RAILWAY COMPANY,
Petitioner.
vs.
ERASTUS W. WILLARD, ADMINISTRATOR OF THE ESTATE OF HAROLD R. WELLMAN, DECEASED,
Respondent.

On Writ of Certiorari, to the United States Circuit Court of Appeals, For the Seventh Circuit.

BRIEF AND ARGUMENT FOR RESPONDENT.

MAY IT PLEASE THE COURT:

The respondent is unable to employ counsel to argue the case at bar orally, and will therefore be compelled to rely solely upon such presentation of the case as he is able to make in the following brief and argument.

STATEMENT OF CASE.

This suit was brought by Erastus W. Willard, administrator of the estate of Harold R. Wellman, deceased, against the Chicago, Burlington & Quincy Railroad Company and the Chicago, Burlington & Quincy Railway Company, to recover damages for wrongfully causing the death of the said Harold R. Wellman.

The Chicago, Burlington & Quincy Railroad Company, was at the time in question, the owner and lessor of the railroad and the Chicago, Burlington & Quincy Railway Company was the lessee and operating road. Under the Statute and laws of Illinois both corporations are liable for damages resulting from the negligence of the operating road.

The suit was commenced in the City Court of Aurora, County of Kane, State of Illinois, and afterwards on petition of the Chicago, Burlington & Quincy Railway Company, removed from the State Court to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

Upon the filing of the transcript of the record of the City Court of Aurora, in the Federal Court, plaintiff below (respondent here) moved the Court to remand the cause to the State Court. A hearing was had in part on this motion on December 24th, 1906, and further hearing postponed until December 26th, 1906. On December 26th, 1906, respondent withdrew his motion to remand and ask leave to file additional counts to the declaration. This leave was granted.

PLEADINGS.

The original declaration consisted of one count. The negligence averred therein is:

That the defendants so carelessly and improperly drove and managed the locomotive engine and trains that by and through the negligence and improper conduct of the defendants in that behalf, the locomotive engine struck deceased, whereby he was then and there killed.

The substance of the additional counts filed December 26th, 1906, is as follows:

First additional count: (In the following statement we refer to the defendant, the Chicago, Burlington & Quincy Railroad Company, as the "Railroad Co.," and the other defendant as the "Railway Co.") That on the 3rd of January, 1906, the defendant "Railroad Company" owned a railroad, extending through portions of the Counties of Cook and Kane, and had before that time leased said railroad to the defendant "Railway Company," which latter Company, on the date aforesaid, ran and operated trains over the same for the conveyance of goods and passengers for reward; that the operating road, the "Railway Company," on the date aforesaid, in violation of the Statute, ran and operated an engine and train over and across the public highway, known as Harlem Avenue, and in so doing, "no bell of at least thirty pounds weight or steam whistle on said locomotive was rung or whistled by the engineer or fireman thereof at the distance of at least eighty rods from the said crossing and kept ringing or whistling until said crossing was

reached," in consequence of which said locomotive engine struck the deceased, who was then crossing the railroad on the line of Harlem Avenue, in the exercise of ordinary care and caution for his own safety, inflicting injuries causing death.

Second additional counts: That the defendant "Railroad Company," on the 3rd day of January, 1906, and before that time, was the owner, and the defendant, the "Railway Company," was the lessee of and was then engaged in the operation of said railroad; that the railroad passed through Berwyn and Riverside, two villages having contiguous territory, the westerly limits of the one being the easterly limits of the other; that the public highway known as Harlem Avenue, the center line of which was the east and west limits of the villages of Riverside and Berwyn respectively, was intersected and crossed by the railroad nearly at right angles; that the railroad consisted of three main tracks, running parallel to each other; that the two villages had each a population of three thousand; that one-half of the population in each resided on the north side of the railroad, and the other half on the south side; that twenty-five percent of the adult inhabitants of the villages were then and for a long time prior thereto employed in Chicago or in suburbs, lying between Chicago and Berwyn on the line of the railroad; that the greater portion of this number were conveyed to and from their work over defendant's railroad; that the depot buildings and platforms, and all stations in Berwyn and Riverside were situated on the south side of the railroad right of way; that Harlem Avenue station was situ-

ated immediately east of and adjoining the highway known as Harlem Avenue, from which station a large number of patrons of the railroad took passage on defendant's trains, one-half of whom were required to pass over the three railroad tracks of the defendant in order to do so; that between Berwyn and Riverside, a distance of about two miles, only three crossings were maintained over the railroad; that a surface street railroad crossed said railroad at grade on Harlem Avenue; that Harlem Avenue was one of the principal streets in the two villages intersected by the railroad.

That the defendant, the "Railway Company," lessee, on the day aforesaid, ran and operated an engine and train over the south track of said railroad in an easterly direction, and caused same to be stopped at the Harlem Avenue station to receive passengers, and ran and operated another engine and train over the middle track in an easterly direction and caused the same to pass Harlem Avenue station at a time when the engine and train first mentioned were at a standstill at the station, receiving passengers; that plaintiff's intestate was proceeding from his home on the north side of the railroad and was crossing the railroad on Harlem Avenue for the purpose of taking passage on the east bound train, then at Harlem Avenue station, and while doing so, in the exercise of ordinary care for his own safety, the defendant, the "Railway Company," so carelessly and negligently and improperly managed and drove the engine and train along and upon the middle track, as aforesaid; that by and through and in consequence of its carelessness and negligence, in that behalf, the locomotive engine,

being operated on the middle track, struck deceased, inflicting injuries ,causing death.

Third additional count: In this count, the facts as to the physical situation and the uses and the extent thereof of Harlem Avenue by the public, etc., are pleaded substantially as in the second additional count.

It is then averred that good railroading and proper regard for the lives and limbs of the inhabitants of the villages and the public generally required that the defendant, the "Railway Company," should maintain gates or provide other adequate means to warn and protect the traveling public, while using Harlem Avenue crossing. The negligence charged is:

"Yet the said defendant, the Chicago, Burlington & Quincy Railway Company, wholly regardless of its duty in the premises, carelessly and negligently caused a locomotive engine with train of cars then attached thereto, then and there being used and operated by the said Chicago, Burlington & Quincy Railway Company to be run and operated over, along, and upon said railroad, and over and across said Harlem Avenue where said railroad then crossed the same at a high and dangerous rate of speed, to-wit, at the speed of sixty miles per hour said locomotive engine and train of cars being then and there run and operated at said high and dangerous rate of speed, over and across said Harlem Avenue crossing, at a time when said locomotive engine and train of cars, would, if running upon the time advertised and scheduled by the said Chicago, Burlington & Quincy Railway Company, have been at a point many miles east of, to-wit:

ten miles east of said Harlem Avenue crossing, and at a time when said Chicago, Burlington & Quincy Railway Company had caused a certain other train, consisting of a locomotive engine and cars, then and there being run and operated by it on said railroad, to be stopped and to be at a standstill at said Harlem Avenue station, and adjoining said crossing, for the purpose of receiving and discharging passengers and in so doing, said defendant, the Chicago, Burlington & Quincy Railway Company failed and neglected to employ a flagman, use gates or other means for the protection of the traveling public, then and there using said crossing, by means whereof, etc."

Then follows the allegation of injury in consequence of the defendant's negligence.

Fourth additional count: The fourth additional count, as to the physical situation and the uses made of Harlem Avenue, the railroad, etc., is substantially the same as the preceding count.

It is then averred that in the management and operation of engines, cars and trains along and upon said railroad, and over said Harlem Avenue with a proper regard for the lives of the inhabitants and the public generally and in an ordinarily careful manner, required of the operating road, the duty to run and operate its engines, cars and trains, and to so guard and protect the traveling public as not to expose the inhabitants and public, in the use of Harlem Avenue crossing to unnecessary hazard and danger. And the negligence charged is:

"Yet the said defendant, the Chicago, Burlington & Quincy Railway Company, wholly regardless of its duty in that behalf, then and there carelessly and negligently caused a locomotive engine with train of cars attached thereto, to be run and operated over, along and upon the middle track of said railroad in an easterly direction, towards the city of Chicago, aforesaid and over and across said Harlem Avenue at a high and dangerous rate of speed, to-wit: at the rate of sixty miles per hour, and in so doing failed and neglected to employ a flagman, use gates or other means for the purpose of warning and protecting such of the public as were then and there using said Harlem Avenue, at the crossing of said railroad therewith, and at a time when the said Chicago, Burlington & Quincy Railway Company, in the management and operation of said railroad, and its locomotive engines, cars and trains thereon, had caused a certain other locomotive engine and train of cars attached thereto, to be stopped and to be at a standstill for the purpose of receiving and discharging passengers at Harlem Avenue station, aforesaid."

Then follows the allegations of consequent injury and death of the deceased on account of the negligence charged while deceased was in the exercise of ordinary care for his own safety.

Fifth additional count: In the fifth additional count, it is averred that the defendants were operating an engine and train over said railroad and over and across a public street, known as Harlem Avenue; that Harlem Avenue

was one of the principal thoroughfares in the villages of Berwyn and Riverside. The negligence charged is:

"Yet the said defendants, wholly regardless of their duty in that behalf, carelessly and negligently ran and operated said locomotive engine and train of cars over, along and upon said railroad, at a high and dangerous rate of speed, to-wit: at the rate of sixty miles per hour, without first providing a means to advise said intestate and the public generally of the approach to said locomotive engine and train of cars, to, towards and across said Harlem Avenue crossing, and at a time when the said defendants knew or could have known, by the exercise of ordinary care on their part, or on the part of either of them, that said railroad at said Harlem Avenue, was being used extensively by the traveling public."

Then follows the allegations that deceased was crossing said railroad on the line of Harlem Avenue in the exercise of ordinary care for his own safety, and in consequence of the negligence of the defendants, was struck and killed.

Sixth additional count: The sixth additional count charges that the "Railroad Company" owned, and that the "Railway Company" was the lessee and operator of the railroad; that the "Railway Company" was possessed of an engine and train and ran and operated the same over said railroad and over and across Harlem Avenue, and in so doing failed and neglected to ring the bell or blow the whistle, in the language of the Statute.

By means whereof, deceased, while crossing the railroad on Harlem Avenue, in the exercise of ordinary care, was struck and killed.

Seventh additional count: The seventh count sets up the ownership of the railroad by the Railroad Company, the operation thereof by the Railway Company, the physical situation as to railroad stations and the limits of the two villages, the population of the villages, the extensive use to which Harlem Avenue was put by the inhabitants, and public, the operation of a street railroad at grade thereon, the fact that only three crossings were maintained across the Burlington road between Riverside and Berwyn, a distance of approximately three miles, the frequency that street cars passed over Harlem Avenue crossing; the fact that a large percentage of the inhabitants of the two villages were conveyed to and from their work between Harlem Avenue and Chicago, and intervening stations, the operation by the defendant Railway Company of the east bound local, the stopping of the local at the Harlem Avenue station to receive passengers, and charging general negligence in the management and operation of the express train on the middle track east bound, in consequence of which the deceased, while passing over the crossing in the exercise of ordinary care, received injuries causing his death.

Eighth additional count: The eighth additional count is similar to the seventh, except as to the negligence charged. Negligence charged in the eighth additional count is as follows:

"Yet the said defendant, the Chicago, Burlington & Quincy Railway Company wholly regardless of its duty in the premises, carelessly and negligently caused a locomotive engine with train of cars then attached thereto,

then and there being used and operated by the said Chicago, Burlington & Quincy Railway Company, over, along and upon said railroad, and over and across said Harlem Avenue, where said railroad then crossed the same, to be run and operated at a high and dangerous rate of speed, to-wit: at the speed of sixty miles per hour; said locomotive engine and train of cars being then and there run and operated at said high and dangerous rate of speed over and across said Harlem Avenue crossing, at a time when said locomotive engine and train of cars, would, if running upon the time advertised and scheduled by the said Chicago, Burlington & Quincy Railway Company, have been at a point many miles off, to-wit: ten miles east of said Harlem Avenue crossing and at a time when said Chicago, Burlington & Quincy Railway Company had caused a certain other train, consisting of a locomotive engine and cars then and there being run and operated by it, on said railroad, to be stopped and to be at a standstill, at said Harlem Avenue station, and adjoining said crossing, for the purpose of receiving and discharging passengers, and in so doing said defendant, the Chicago, Burlington & Quincy Railway Company failed and neglected to employ a flagman, use gates or other means for the protection of the traveling public, then and there using said crossing."

Ninth additional count: The ninth additional count does not differ substantially from the eighth.

To plaintiff's declaration, defendants filed a plea of the general issue.

FACTS.

On the third day of January, 1906, Harold R. Wellman, then a resident of the village of Riverside, while crossing the tracks of the Chicago, Burlington & Quincy, on Harlem Avenue, in Berwyn, was struck by the pilot of the engine of an east-bound express train, and instantly killed. He left him surviving, Victoria W. Wellman, his widow, and Willard Wellman, his son, next of kin and only heir at law.

The Chicago, Burlington & Quincy Railroad Company, at that time, was the owner and lessor, and the Chicago, Burlington & Quincy Railway Company was the operator and lessee of the railroad in question.

The villages of Berwyn and Riverside, on the line of the Burlington road, are adjacent to each other. The east boundary line of Riverside (being the center line of Harlem Avenue) is the west boundary line of Berwyn. The population of Riverside was then 2,500 and that of Berwyn, 3,500. Each village, as to territory and population was divided into two equal parts by the railroad.

The railroad maintained three main tracks through these villages. The south track was used for east-bound traffic, the north for west-bound, and the middle for east-bound in the forenoon and west-bound in the afternoon. A surface street railroad had, before that time, been constructed and was then being operated between Lyons, in Cook County, and Fortieth Street and Ogden Avenue, Chicago. Its tracks were laid in Harlem Avenue, east of the center line, and wholly within the village of Berwyn.

Harlem Avenue runs north and south. The street railroad, after crossing the Burlington on the line of Harlem Avenue, turns east on Stanley Avenue and runs from thence substantially parallel to the Burlington road and in close proximity to it. This was the only surface street railway which crossed the tracks of the Burlington within the limits of the villages. The distance between Harlem Avenue and the Berwyn station is three-quarters of a mile. The distance between Harlem Avenue and Riverside station on the west is about a mile. Street cars passed over the railroad crossing at Harlem Avenue between six o'clock a. m. and ten o'clock a. m., going either north or south, every five minutes. Harlem Avenue was one of the principal highways in the villages, and was used extensively by the public in street cars, carriages and other vehicles and on foot. Immediately east of Harlem Avenue, and on the south side of the railroad right-of-way and within seventy-five or one hundred feet of the street, the Railroad Company maintained a depot and depot platform, known as the Harlem Avenue station. The inhabitants of both villages living on the north side of the tracks had therefore to cross all three tracks to reach this depot. The next station to the east was Berwyn, three-quarters of a mile distant, situated likewise on the south side of the right of way. The next station to the west, and about a mile distant, was Riverside.

On the day in question and for a considerable time prior thereto, a local train, termed by some of the witnesses, the "dinky," was made up at and left Riverside

at 8:41 in the morning, and was due at the Harlem Avenue station at 8:42. Owing to this fact, this train was usually on time. A regular train, east-bound, due at Canal and Sixteenth Streets, Chicago, at 8:55 o'clock a. m., was not scheduled to and did not stop between Riverside and Chicago. This express was due to pass the Harlem Avenue station, east-bound, about ten minutes before the "dinky" or local was due to leave the same station. The local on the morning in qestion, was at the Harlem Avenue station substantially on time. It was run over the south track. The express was ten minutes late. It was run over the middle track. It appears from the evidence that the deceased knew that the express was due to pass the Harlem Avenue station about ten minutes before the local was due.

The deceased was employed at the Western Electric at Hawthorne. To go from his home to Hawthorne, he sometimes took the street car at Harlem Avenue crossing, but generally went by way of the Burlington. It was *not* his practice to take the train at the Harlem Avenue station. He usually took passage from Riverside on a train leaving Riverside at 8:09 a. m. At that time, he lived on the north side of the tracks about midway between Riverside and Harlem Avenue stations. On the morning of January third, deceased's child was sick. He was delayed on that account, and prevented from taking his regular train at Riverside. He remained at his home attending the child, intending to catch the local due at Harlem Avenue station at 8:42. Shortly before 8:42 he left his home and hurried to the station. He did not go

by way of any regular public highway. He cut across lots to the right-of-way of the railroad, at a point some distance west of Harlem Avenue, and walked east on a cinder path, on the right-of-way and north of the north main track, until he was within a short distance of the center line of Harlem Avenue. From thence he proceeded diagonally across the tracks towards the station.

It was a very foggy morning, so much so, that an object could not be seen a distance of over 150 to 200 feet. It was raining quite heavily. The deceased carried an open umbrella to shelter himself from the rain. There was a strong wind from the east. It was blowing in substantially the direction of the railroad right-of-way. The weather was quite cold, so much so, that flurries of snow, at times, took the place of the rain. At about 8:42 a street car, in charge of James Lane, the motorman, and John E. Sullivan, the conductor, was passing along Harlem Avenue, going north towards the railroad. Just as the street car reached the railroad crossing, the east-bound local pulled in on the south track, and stopped at the Harlem Avenue station to receive passengers. After the local had cleared the crossing, a train on the north track, west-bound, passed over the crossing. The conductor of the street car immediately left the car to "run the crossing." He proceeded north to the center of the middle track of the railroad. He looked to the east and to the west and listened for the approach of trains. He first noticed the deceased coming along the railroad right-of-way at a point about 100 feet west of the line of the street car (this would place him, then about 65 or 70 feet west of the

west line of the street). Just about the time at which the conductor noticed the deceased, the deceased took down his umbrella and started to run east until within 20 feet of the street car crossing, and thence diagonally towards him. The bell on the local was ringing. Large volumes of steam and smoke were being emitted from the engine of the local. This steam and smoke was being blown down the track towards the west.

As the conductor stood upon the middle track, looking and listening, he was first apprised of the approach towards the east of the express train, by the ringing of the rails. As he stood there, he was listening for the statutory signals, the ringing of the bell and the blowing of the whistle, but heard neither. He could not see the train on account of the fog. He knew it was approaching solely from the ringing of the rails. The proof is such in this record, that it may be stated as a fact, that the east-bound express approached the crossing without ringing a bell or blowing a whistle. It was going at a rapid rate of speed, variously estimated by the witnesses, at from forty-five to fifty miles per hour. It was ten minutes late. As Sullivan stood there, watching for the approaching train, the deceased was running towards him, and towards the Harlem Avenue station. When the deceased had reached a point estimated by Sullivan to be about fifteen or twenty feet from the intersection of the street car track and the middle railroad track, the express hove in sight through the fog. It was then within one hundred or two hundred feet of the street car track. Sullivan, who had watched the deceased at intervals, from the time he

started to run, appreciating the danger he was in, called out to him, and waived his hand. The deceased may have been confused by the shouting or may have been misled as to what the conductor meant by the waiving of his hand. He might have taken the motion of the conductor's hand to be a direction to the motorman to start across the tracks. At that instant there was necessarily much confusion at the crossing, due to the steam and smoke escaping from the engine of the local, the fog, the rain, the ringing of the bell on the local, the noise made by the train west-bound on the north track, which had just passed, and the shouting and waiving of the hand by Sullivan.

There is no positive proof that deceased did not look or listen. He may have done both. The presumption is that he did.

Just as he reached the center of the street car track, and the middle railroad track, he was struck by the pilot of the engine of the express, east-bound, thrown about one hundred feet, and instantly killed.

Deceased was a high-class electrical engineer, earning a salary of three thousand dollars a year. He left a widow and one child.

A hearing was had in the United States Circuit Court, Northern District of Illinois, Eastern Division, in the month of June, 1907. After the plaintiff had submitted all of his proofs the Trial Court directed a verdict for the defendants. Respondent, here, prosecuted a writ of error from the Circuit Court of Appeals, for the Seventh Cir-

cuit. On the 6th day of October, 1908, the Circuit Court of Appeals rendered a judgment reversing the trial Court, on the ground of want of jurisdiction, with directions to the Circuit Court of the United States for the Northern District of Illinois, to remand the cause to the City Court of Aurora, Kane County, Illinois.

The Case has been brought to this Court for review, on certiorari, by the Chicago, Burlington & Quincy Railway Company.

BRIEF.

I.

It is the settled law of Illinois that when an injury results from the negligent operation of a railway, whether by the corporation to which the franchise is granted, *or its lessee,* both the lessor and the lessee are liable to respond in damages.

Pennsylvania Co. et. al. vs. *Ellett,* 132 Ill., 654.

C. & E. I. Ry. Co., et. al. vs. *Mecch* 163 Ill. 305.

West Chicago St. Ry. Co. et. al. vs. *Horne,* 197 Ill., 250.

C. & W. I. R. R. Co. vs. *Newell,* 212 Ill., 336.

An action of tort, which might have been brought against many persons or against any one or more of them, and which is brought in a State Court against all jointly, contains no separate controversy, which will authorize its removal by some of the defendants in the Federal Circuit Court, even if they file separate answers and set up different defenses from the other defendants and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one.

Alabama G. S. R. Co. vs. *Thompson,* 200 U. S., 206.

Powers vs. *Chestpeka, etc., R. R. Co.,* 169 U. S., 97.

Louisville, etc., R. Co. vs. *Wangelin,* 132 U. S.., 601.

Plymouth Gold Mining Co. vs. *Amadore, etc., Canal Co.,* 118 U. S., 264.

Pirie vs. *Tvedt*, 115 U. S., 43.

Sloane vs. *Anderson*, 117 U. S., 275.

Lyttle vs. *Giles*, 118 U. S., 596.

Torrence vs. *Shed*, 144 U. S., 530.

Connell vs. *Smiley*, 156 U. S., 340.

Hyde vs. *Rubel*, 104 U. S., 407.

Ayres vs. *Wiswall*, 112 U. S., 192.

Warax vs. *Cincinnati, etc., R. Co.*, 72 Fed., 640.

Ill. Central R. R. Co. vs. *LeBlanc*, 74 Miss., 626.

A defendant has no right to say that an action shall be separate, which a plaintiff elects to make joint. A separate defense may defeat a joint recovery, but it can not deprive a plaintiff of his right to prosecute his own suit to final determination in his own way.

Pirie vs. *Tvedt*, 115 U. S., 43.

Alabama G. S. R. Co. vs. *Thompson*, 200 U. S., 206.

The question whether there is a separable controversy, warranting a removal, must be determined by the state of the pleadings and the record of the case at the time of the application for removal.

Alabama G. S. R. Co. vs. *Thompson*, 200 U. S., 206.

Wilson vs. *Oswego Twp.*, 151 U. S., 65.

Merchants Cotton Press, etc., Co. vs. *Ins. Co. of N. Am.*, 151 U. S., 384.

Louisville, etc., R. R. Co. vs. *Wangelin*, 132 U. S., 601.

In determining whether there is a separable controversy, the cause of action is for all the purposes of the suit whatever the plaintiff declares it to be in its pleadings and the allegations of the plaintiff must be accepted as true.

Alabama G. S. R. Co. vs. *Thompson,* 200 U. S., 206.

Torrence vs. *Shed,* 144 U. S., 530.

Louisville, etc., R. R. Co. vs. *Ide,* 114 U. S., 52.

Lyttle vs. *Giles,* 118 U. S., 601.

Plymouth Gold Mining Co. vs. *Amador, etc., Canal Co.,* 118 U. S., 270.

Deere vs. *Chicago, etc., R. R. Co.,* 85 Fed., 881.

Warax vs. *Cincinnati, etc., R. Co.,* 72 Fed., 640.

Offner Case, 148 Fed., 201.

Where the pleadings do not on their face show a separable controversy, its existence must be averred in the petition for removal by the statement of the *facts* from which the conclusion arises.

Anderson vs. *Boughes,* 40 Fed., 708.

In every pleading by which the existence of fraud is put in issue, the facts constituting the fraud must be distinctly averred. General allegations and mere conclusions of law are insufficient.

Stearns vs. *Page,* 7 How., 819-829.

Wood vs. *Carpenter,* 101 U. S., 135.

Pleadings must state facts, not conclusions of law.

Alabama vs. *Burr,* 115 U. S., 413.

An allegation that what was done was "colorable" or "fradulent" is a conclusion of law, which a demurrer does not admit.

Fogg vs. *Blair,* 139 U. S. 118.

II.

When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury.

Grand Trunk Ry. Co. vs. *Ives,* 144 U. S., 408.

Ry. Co. vs. *Jarvi,* 53 Federal, 65.

Ry. Co. vs. *Converse,* 139 U. S., 469.

Ry. Co. vs. *Pollard,* 22, Wallace, 341.

Warner, Admr. vs. *Baltimore & Ohio R. R. Co.,* 168 U. S., 338.

Baltimore & Ohio R. R. Co. vs. *Griffith,* 159 U. S., 603.

III.

The obligations, rights and duties of railroads and travellers upon intersecting highways are mutual and reciprocal and no greater degree of care is required of the one than of the other.

The Continental Improvement Co. vs. *Stead,* 5 Otto., 161.

IV.

Both parties are charged with the duty of keeping a careful lookout for danger; and the degree of diligence to

be exercised on either side is such as a prudent man would exercise under the circumstances of the case.

The Continental Improvement Co. vs. *Stead,* 5 Otto., 161.

Grand Trunk Ry. Co. vs. *Ives,* 144 U. S., 408.

V.

In the absence of positive evidence to the contrary, it will be presumed that the deceased looked and listened and did all that a prudent man would have done under like circumstances.

Texas & P. R. Co. vs. *Gentry,* 163 U. S., 353.

Cleveland C. & C. R. Co. vs. *Crawford,* 24 Ohio State, 636.

Continental Improvement Co. vs. *Stead,* 95 U. S., 161.

VI.

The duty to look and listen is not an absolute one, but one, the exercise of which is dependent on conditions.

The qualification of the rule which justifies the taking into account all the surrounding circumstances in determining whether there was negligence in failing to look and listen, is well established.

There is no fixed standard in law by which the Court is enabled to say in every case what conduct shall be considered reasonable and prudent and what shall constitute ordinary care under all circumstances.

Grand Trunk Ry. Co. vs. *Ives,* 144 U. S., 408.

C. N. O. & T. P. Ry. Co. vs. *Farra,* 66 Fed., 496.

McGhee vs. *White,* 66 Fed., 502.

Terre Haute & Indianapolis R. R. Co. vs. *Voelker,* 129 Ill., 540.

Chicago & N. W. R. R. Co. vs. *Hansen,* 166 Ill., 623.

Lorenz, Admr. vs. *Burlington, Cedar Rapids, & Northern Ry. Co.,* 56 L. R. A. (Iowa), 752.

Funston vs. *C. R. I. & P. Ry. Co.,* 61 Iowa, 452.

Lichtenberger vs. *Meriden,* 91 Iowa, 45.

Thompson vs. *N. Y. Cent. & H. R. R. Co.,* 110 N. Y., 636.

Howland vs. *Union St. Ry. Co.,* 150 Mass., 86.

Kane vs. *Northern C. R. Co.,* 128 U. S., 91.

VII.

If the view of the railroad, as the crossing is approached upon the highway, is obstructed by any means, so as to render it impossible or difficult to learn of the approach of a train or there are complicating circumstances, calculated to deceive or throw a person off his guard, then whether it was negligence on the part of the plaintiff under the particular circumstances of the case is a question of fact for the jury.

Grand Trunk R. R. Co. vs. *Ives.* 144 U. S., 408.

Gratiot vs. *Missouri Pacific R. Co.,* 16 L. R. A. 189.

Renwick vs. *N. Y. Cent. R. Co.*, 36 N. Y., 132.

Ernst vs. *Hudson River R. Co.*, 32 How., Pr., 79.

Beisiegel vs. *N. Y. Cent. R. Co.*, 34 N. Y., 623.

Maginnis vs. *N. Y. Cent. & H. R. Co.*, 52 N. Y., 215.

Plummer vs. *Eastern R. Co.*, 73 Me., 591.

Keese vs. *N. Y. N. H. & H. R. Co.*, 67 Barb., 205.

Barry vs. *Hannibal & St. J. R. Co.*, 98 Mo., 62.

Barton vs. *St. Louis & I. M. R. Co.*, 52 Mo., 253.

O'Connor vs. *Missouri Pac. R. Co.*, 94 Mo., 150.

Piper vs. *Chicago, M. & St. P. R. Co.*, 77 Wis., 247.

O'Mara vs. *Hudson R. R. R. Co.*, 38 N. Y., 445.

Telfer vs. *N. R. R. Co.*, 30 N. J., 188.

Milwaukee & C. R. Co. vs. *Hunter*, 11 Wis., 160.

Laverenz vs. *C. R. I. & P. Ry. Co.*, 56 Iowa, 693.

Hart vs. *Devereaux*, 41 Ohio St., 565.

Chicago & Alton Ry. C. vs. *Adler*, 129 Ill., 335.

C. N. O. & T. P. Ry. Co. vs. *Farra*, 66 *Fed.*, 495.

McGhee vs. *White*, 66 Fed., 502.

VIII.

The mere fact that a pedestrian does not look to see if a train is approaching is not under the circumstances of every case, conclusive of a want of due care on his part.

Gaynor vs. *Old Colony & N. Ry. Co.*, 100 Mass., 208-213.

Chaffe vs. *Boston & L. R. Corp.*, 104 Mass., 108.

Mayo vs. *Boston & M. R. R. Co.*, 104 Mass., 137-141.

Somer vs. *Boston & A. R. R. Co.*, 141 Mass., 10.

IX.

A failure to look and listen will not prevent recovery, if they would not have availed to avoid the consequence of the Railroad Company's negligence.

C. & C. etc., R. R. Co. vs. *Crawford*, 24 Ohio State, 631.

X.

The absence of fault on the part of the deceased may be inferred from circumstances and the disposition of a person to take care of himself and keep out of difficulty, may be properly taken into consideration.

Washington & G. R. Co. vs. *Gladmon*, 82 U. S. 401.

XI.

The law presumes the injured party was in the exercise

of due care. The burden of proving contributory negligence rests upon the defendant.

Washington & G. R. Co. vs. *Gladmon,* 82 U. S. 407.

Baltimore & Ohio R. R. Co. vs. *Whitacre,* 35 Ohio State, 627.

XII.

A traveler in crossing a railroad, may assume that all the requirements of the law will be complied with by the Railroad Combpany.

Klanowaski vs. *Grand Trunk Ry. Co.,* 57 Mich., 528.

Chicago R. & I. P. Ry. Co. vs. *Houston,* 95 U. S., 697.

Hayes vs. *Michigan Central R. R. Co.,* 111 U. S., 228.

XIII.

A high rate of speed might be perfectly safe at country crossings, although it might be considered negligence at a crossing in a populace city.

3rd Elliot on Railroads, Sec. 1160.

Wabash Ry. Co. vs. *Henks,* 91 Ill., 406.

Chicago & N. W. Ry. Co. vs. *Dunleavy,* 129 Ill., 132.

C. B. & Q. Ry. Co. vs. *Perkins,* 125 Ill., 127.

Overtoom vs. *C. & E. I. R. R. Co.,* 181 Ill., 326.

ARGUMENT.

It is averred in the petition of the Chicago, Burlington & Quincy Railway Company, for removal of the cause, from the State to the Federal Court that, the Chicago, Burlington and Quincy Railroad Company was the owner and lessor of the railway and the Chicago, Burlington & Quincy Railway Company was the operating and lessee railway. (Rec. 9.)

As both companies were liable under the law of Illinois, for the negligence of the lessee company they were both properly joined as defendants in the State Court. (See authorities cited under Proposition I, respondent's brief.)

The allegation in the petition for removal (Rec. 10): that the Illinois corporation *"was fraudulently and improperly joined as a party defendant * * * for the sole purpose of defeating the rights of the petitioner to remove the cause, etc.,"* is a mere *conclusion* of the pleader and not a *traversible fact.*

Fogg vs. *Blair,* 139 U. S., 118

Every fact well pleaded in the petition for removal, shows the "good faith" on the part of the respondent in joining both companies as defendants.

Counsel for petitioner emphasize the fact that at the the time this suit was instituted in the State Court, the domestic corporation had leased its railroad tracks, equipment, property, rights and franchises to the Iowa company, for a period of ninety-nine (99) years, and assumes that such action on the part of the domestic corporation rendered it execution proof, thereby making

its joinder as co-defendant with the foreign corporation improper.

The mere fact that a railroad company enters into a lease, leasing its railroad equipments, etc., to another railroad company, does not render it insolvent, and even if it should be admitted that it did, insolvency on the part of the domestic corporation could not deprive a person sustaining an injury at the hands of another for whose acts the domestic corporation was, in law, responsible, from electing to bring a joint action against both tort feasors.

The Offner case, reported in 148 Federal, 201, and the Thompson case cited by us in our brief, are decisive of this case, on the question of jurisdiction.

II.

THE QUESTION OF RESPONDENT'S CONTRIBUTORY NEGLIGENCE WAS A QUESTION OF FACT AND SHOULD HAVE BEEN SUBMITTED TO THE JURY. THE TRIAL COURT ERRED IN DIRECTING A VERDICT FOR THE DEFENDANT'S BELOW.

Section 6 of an Act of the General Assembly of the State of Illinois, entitled "An Act in Relation to Fencing and Operating Railroads," (Hurd's Revised Statute, Chap. 114, Par. 68), provides:

"Every Railroad Corporation shall cause a bell of at least thirty pounds weight, and a steam whistle placed and kept on each locomotive engine, and shall cause the same to be rung or whistled by the engineer or fireman, at a distance of at least eighty rods from the place where

the railroad crosses or intersects any public highway and shall be kept ringing or whistling until such highway is reached."

The declaration in this case charges the defendants with negligence in failing to discharge the statutory duty imposed by the above section.

There is ample evidence in the record fairly tending to prove the negligence charged (Rec. 88, 89 and 120).

The trial court in directing a verdict in the case, at bar, rested its action exclusively upon the conclusion that the deceased, as a matter of law, was guilty of contributory negligence, and it is to this question that we particulary direct the attention of this Court.

A traveler in crossing the railroad on a public highway is required by law to exercise ordinary care. What constitutes ordinary care is usually a question of fact. When a given state of facts is such that reasonable men may fairly differ upon the question, as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men *must* draw the same conclusion from them, that the question of negligence is ever considered as one of law for the Court. (See cases cited under proposition II, in brief.)

It is well settled that it is only when the evidence leaves the material facts admitted or undisputed, and only when these facts are such that reasonable men, in the exercise of an honest and impartial judgment, can fairly draw but one conclusion from them, that the

Court may properly withdraw the case from the jury. If the evidence, relative to the material facts, is contradictory or *if from the admitted facts the unprejudiced minds of reasonable men may well draw different conclusions, it is the duty of the Court to submit the issues to the jury.*

Railroad Co. vs. *Converse,* 139 U. S., 469.

Railroad Co. vs. *Pollard,* 22 Wall., 341.

Railroad Co. vs. *Ives,* 144 U. S., 408.

Railway Co. vs. *Jarvi,* 53 Fed., 65.

Let us examine some of the proofs in this record.

The railroad runs southwest and northeast (Rec. 58). To use the language of the witness, Dwight L. Kammerer, "almost east and west; a little bit to the south." Harlem Avenue, where the same was crossed by the railroad, runs north and south (Rec. 61). The center line of this highway constitutes the dividing line between the two villages (Rec. 57 and 114). East of Harlem Avenue and within a hundred feet of the street on the south side of the railroad, the Railroad Company maintained a depot and depot platform, known as the Harlem Avenue station (Rec. 73). On the same side of the railroad, and three-fourths of a mile east of Harlem Avenue was Berwyn station, and on the same side of the railroad, and one mile west of Harlem Avenue, was Riverside station (Rec. 101). The railroad consisted of three main tracks, running parallel with each other. The south track was used exclusively for east-bound trains; the north for west-bound, and the

middle for east-bound in the forenoon and west-bound in the afternoon (Rec. 58 and 87). On the 3rd of January, 1906, a street car running between Lyons and Ogden Avenue was proceeding north on Harlem Avenue. It stopped at the crossing as a local east-bound, pulled up to the Harlem Avenue station and stopped, at 8:42 a. m. (Rec. 63 and 85). There is conflict in the evidence as to the position of the street car, when it came to a standstill. One witness places the front of the car within fifteen feet of the south rail of the south track (Rec. 71-72); another, fifty feet from the crossing (Rec. 85).

After the local had cleared the crossing, a train passed over the crossing, west-bound, on the north track (Rec. 120 and 99 and 96). After the east-bound local had pulled by the crossing, the conductor left the street car to "run the crossing." He proceeded north and stood upon the middle track of the railroad. He stood there looking and listening. He was listening for the statutory signals, from an express train, then east-bound, and close to the crossing, on the middle track. The express approached the crossing at a speed of fifty miles an hour without ringing a bell or blowing a whistle. (Rec. 185 to 190) (Rec. 120). The view of the approach of the express train was obstructed by a dense fog and smoke and steam from the engine of the local at the Harlem Avenue station (Rec. 90-91-96-97-98-150-151). An object could not be seen through the fog over a hundred and fifty or two hundred feet (Rec. 150-151-96-97). It was raining and the wind was blowing from the east (Rec. 150-151-90-91). The express was ten minutes

late (Rec. 104 and 147 and 148). The street car conductor, who stood on the middle track looking and listening knew of its approach solely from the ring of the rails (Rec. 88-90).

Harold R. Wellman, the deceased, was employed at Hawthorne, four miles east of Harlem Avenue on the Burlington road (Rec. 58 and 149). He lived in Riverside, midway between Riverside station and Harlem Avenue station on the north side of the tracks(Rec. 135 and 149). He usually took the train at Riverside, leaving that point at 8:09 in the morning (Rec. 150). Before that time, he had frequently taken the 8:42 at Harlem Avenue station (Rec. 155). He knew that the express was due on schedule time to pass Harlem Avenue ten minutes before the local was due (Rec. 103 and 104). On the morning in question, he left his home shortly before train time to take passage on the local at Harlem Avenue at 8:42 (Rec. 150). He cut across from his home to the railroad right-of-way a short distance west of Harlem Avenue, and proceeded easterly on a cinder path on the right-of-way until within fifteen or twenty feet of the street car crossing on Harlem Avenue (Rec. 150 and 94-96) and thence diagonally across Harlem Avenue towards the Harlem Avenue station (Rec. 88-90). He was first seen by Sullivan when within a hundred feet of the street car tracks on the railroad right-of-way (Rec. 94). At that time he carried an open umbrella to shelter himself from the rain (Rec. 95). About the time the conductor first observed him, he removed his umbrella, ran east, thence diagonally,

as indicated (Rec. 95). When within fifteen or twenty feet of the intersection of the street car track, and the middle railroad track, the express first became visible to the conductor (Rec. 88 and 96). The bell on the local was then ringing (Rec. 82 and 83). The conductor appreciating Wellman's danger, shouted to him and waived his hand (Rec. 128 and 135). When deceased reached the middle of the street and the center railroad track, he was struck and instantly killed (Rec. 90). The conductor, Sullivan, and the motorman, Lané, both testified that they had watched the deceased while he was running diagonally across Harlem Avenue and that they did not see him look towards the west, the direction from which the express came (Rec. 95, 133 and 130). The trial court, on this testimony, held the deceased guilty of contributory negligence, and directed a verdict for the defendants (Rec. 164).

An examination of the testimony of Messrs. Lane and Sullivan (Rec. 95 and 130-133) will show that it is not affirmative of the fact that the deceased did not look or listen. In the very nature of the things, even had they testified positively that they had their eyes riveted on Mr. Wellman constantly to the exclusion of all other objects, such proof would not conclusively establish the fact that the deceased did not look. When the deceased started to run diagonally across Harlem Avenue from a point fifteen or twenty feet west of the street car track, towards the intersection of the street car track and the middle railroad track, he was running on a line almost at right angles to the railroad track

due to the fact that the highway runs north and south and the railroad tracks run southwest and northeast. It was raining and the wind was blowing from the east. It is common observation, requiring no proof, that a person in a rain storm turns the back of his head towards the direction from which the storm is proceeding. In that attitude, the deceased, without turning his body or neck or moving a muscle except of the eye itself, could look in the direction from which the express was coming, without the fact being known to either Messrs. Sullivan or Lane. That he did look is a presumption of law which must be overcome by affirmative evidence to the contrary.

Continental Improvement Co. vs. *Stead*, 5 Otto., 161.

Cleveland C. & C. R. Co., vs. *Crawford*, 24 Ohio State, 636.

Texas & P. R. Co. vs. *Gentry*, 163 U. S. 353.

Why did he remove his umbrella if not for the purpose of affording him an opportunity to look while running to catch his train?

If the deceased had survived, and had testified that he did not look or if before his death, in discussing with a third person, the causes which led to the collision, he made a statement or admission that he did not look, and evidence of such statement or admission had been submitted, the case would be wholly different, but even in such case, the question of contributory negligence in view of the many other facts and circumstances, appearing in this

record, likely to influence the conduct of a reasonably prudent person, would be one of fact and not of law.

The law does not require any one to do that which would be worthless or unavailing. It does not require a traveler to look for the approach of a train, where looking would avail the traveler nothing on account of obstructions to the view.

C. & C. etc., R. R. Co. vs. *Crawford,* 24 Ohio State, 631.

Even if deceased had looked intently, he could not have seen the express train until he was within fifteen feet of the crossing (Rec. 94 and 96). The fog constituted a complete obstruction to the view until he had reached that point. At that instant the train became visible and the conductor of the street car immediately shouted to the deceased and waived his hand (Rec. 96). Did the conduct of the conductor in this respect, for the moment, distract the attention of this unfortunate traveler? The deceased was then between the south rail of the north track and the north rail of the middle track (Rec. 128 and 129). The train was running at the rate of fifty miles per hour. The deceased knew that the express was not due at that station at that time. It was ten minutes late. It was then within one hundred and fifty feet of the point of collision. It covered that distance in two seconds of time. The bell on the local was ringing. Steam and smoke was being blown over the crossing. The existence of the fog wrought confusion as to the location and appearance of familiar objects. The wind and rain to some extent occupied the attention

of the deceased. The conductor of the street car was shouting and waiving his hand. The deceased was no doubt deceived by the noise of the train, which had just passed west on the north track. In short, the situation was such as would tend to confusion, the influence of which upon the conduct of a reasonably prudent person, was a proper question to be submitted to the jury. It was such a situation as brings the case clearly within one of the recognized exceptions to the "look and listen" doctrine.

The duty to look and listen is not an absolute one, but one, the exercise of which, is dependent on conditions. The qualification of the rule which justifies the taking into account *all the surrounding ciscumstances* in determing whether there was negligence in failing to look and listen is well established.

There is no fixed standard in law by which the Court is enabled to say in every case what conduct shall be considered reasonable and prudent and what shall constitute ordinary care under all circumstances.

Grand Trunk Ry. Co. vs. *Ives*, 144 U. S. 408.
C. N. O. & T. Ry Co. vs. *Farra*, 66 Fed., 496
McGhee vs. *White*, 66 Fed., 502.

(And other cases cited in support of propositions VI and VII of the brief.)

In order that a trial court may properly withdraw a case from the jury, the conclusion of the existence of contributory negligence must be clear and indisputable. If the state of the case is such as to give rise to doubt or

the inferences to be drawn from the admitted facts may be different in the minds of reasonable men in the exercise of an honest and unprejudiced judgment, it is the duty of the Court to submit the issues to the jury.

We most earnestly insist that the Court below committed a grievous error in directing a verdict for the defendants below.

Respectfully submitted,

P. C. HALEY,

Counsel for Respondent.

Arthur J. Eddy

Emil C. Wetten

CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY *v.* WILLARD.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 105. Submitted March 17, 1911.—Decided April 10, 1911.

On every writ of error or appeal the first and fundamental question is that of jurisdiction; first of this court and then of the court below. This question must be asked and answered by the court itself, even when not otherwise suggested and without respect to the relation of the parties to it. *M. C. & L. M. Ry. Co.* v. *Swan*, 111 U. S. 379.
Consent of parties can never confer jurisdiction upon a Federal court,

and this court can of its own motion prevent the Circuit Court from exercising jurisdiction not conferred upon it by statute. *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48.

In the absence of express exemptions in the statute, a statutory permission to a railroad to lease its road does not relieve the lessor from its charter obligations.

Where, as in Illinois, the lessor railroad company remains liable with the lessee company for torts arising from operation, a plaintiff sustaining injuries may bring an action either separately or against both jointly and in the latter case neither defendant can remove on the ground of diverse citizenship if either is a resident of the plaintiff's State.

A defendant cannot say that an action shall be several if the plaintiff has a right, and so declares, to make it joint; and to make it joint is not fraudulent if the right to do so exists, even if plaintiff does so to prevent removal.

Removability of an action depends upon the state of the pleadings and the record at the time of the application.

THE facts, which involve the jurisdiction of the Circuit Court, and the right of a defendant to remove a case thereto from the state court on the ground of separable controversy, are stated in the opinion.

Mr. Albert J. Hopkins and *Mr. Chester M. Dawes* for petitioner:

The Circuit Court of the United States for the Northern District of Illinois had full and complete jurisdiction of said cause, and the Circuit Court of Appeals erred in holding that said court did not acquire jurisdiction, in reversing the judgment of the trial court, and in not affirming the judgment of the trial court. *Hatchen* v. *T. W. & W. Ry. Co.*, 62 Illinois, 477; *Atlantic Railroad R. Co.* v. *Southern Ry. Co.*, 153 Fed. Rep. 122; *Kelly* v. *C. & A. Ry. Co.*, 122 Fed. Rep. 286; *Ross* v. *Erie R. R. Co.*, 120 Fed. Rep. 703; *Durkee* v. *Illinois Central R. R. Co.*, 81 Fed. Rep. 1; *Dishon* v. *C., N. O. & T. P. Ry. Co.*, 133 Fed. Rep. 471; *Kentucky* v. *Powers*, 201 U. S. 1, 34; *Dow* v. *Bradstreet Company*, 46 Fed. Rep. 824; *Kelly* v. *Chicago &c.*

Railway Co., 122 Fed. Rep. 286; *Weaver* v. *Northern Pacific Railway Co.*, 125 Fed. Rep. 155; *Railway Co.* v. *Ramsey*, 22 Wall. 322.

The jurisdiction of the Federal court in this case attached to this cause by reason of the course of the plaintiff. It is a question, not of enlarging the jurisdiction of the Federal courts, but whether or not the plaintiff did not concede, by his course, the jurisdiction of the Federal court. *Davies* v. *Lathrop*, 15 Fed. Rep. 565; *Railway Co.* v. *Ramson*, 22 Wall. 322; *Carrington* v. *Florida R. R. Co.*, 9 Blatchf. 467; *Edgerton* v. *Gilpin*, 3 Woods, 277; *Baggs* v. *Martin*, 179 U. S. 206; *In re Moore*, 209 U. S. 490.

Mr. Arthur J. Eddy, *Mr. Emil C. Wetten* and *Mr. P. C. Haley* for respondent:

In Illinois, when an injury results from the negligent operation of a railway, whether by the corporation to which the franchise is granted, or its lessee, both the lessor and the lessee are liable. *Pennsylvania Co.* v. *Ellett*, 132 Illinois, 654; *C. & E. I. Ry. Co.* v. *Meech*, 163 Illinois, 305; *West Chicago St. Ry. Co.* v. *Horne*, 197 Illinois, 250; *C. & W. I. R. R. Co.* v. *Newell*, 212 Illinois, 336.

An action of tort, which might have been brought against many persons or against one or more of them, and which is brought in a state court against all jointly, contains no separable controversy which will authorize its removal by some of the defendants to the Federal Circuit Court, even if they file separate answers and set up different defenses from the other defendants and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one. *Alabama G. S. R. Co.* v. *Thompson*, 200 U. S. 206; *Powers* v. *Chesapeake &c. R. R. Co.*, 169 U. S. 97; *Louisville &c. Ry. Co.* v. *Wangelin*, 132 U. S. 601; *Plymouth Gold Mining Co.* v. *Amadore &c. Canal Co.*, 118 U. S. 264; *Pirie* v. *Tvedt*, 115 U. S. 43; *Sloane* v. *Anderson*, 117 U. S. 275; *Lyttle* v. *Giles*,

118 U. S. 596; *Torrence* v. *Shed*, 144 U. S. 530; *Connell* v. *Smiley*, 156 U. S. 340; *Hyde* v. *Rubel*, 104 U. S. 407; *Ayres* v. *Wiswall*, 112 U. S. 192; *Warax* v. *Cincinnati &c. R. Co.*, 72 Fed. Rep. 640; *Ill. Cent. R. R. Co.* v. *LeBlanc*, 74 Mississippi, 626.

A defendant has no right to say that an action shall be separate, which a plaintiff elects to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way. *Pirie* v. *Tvedt*, 115 U. S. 43.

The question whether there is a separable controversy, warranting a removal, must be determined by the state of the pleadings and the record of the case at the time of the application for removal. *Wilson* v. *Oswego Twp.*, 151 U. S. 65; *Merchants' Cotton Co.* v. *Ins. Co.*, 151 U. S. 384.

In determining whether there is a separable controversy, the cause of action is for all the purposes of the suit whatever the plaintiff declares it to be in its pleadings and the allegations of the plaintiff must be accepted as true. Cases *supra* and *Louisville &c. R. R. Co.* v. *Ide*, 114 U. S. 52; *Deere* v. *Chicago &c. R. R. Co.*, 85 Fed. Rep. 881; *Offner Case*, 148 Fed. Rep. 201.

Where the pleadings do not on their face show a separable controversy, its existence must be averred in the petition for removal by the statement of the *facts* from which the conclusion arises. *Anderson* v. *Bowers*, 40 Fed. Rep. 708.

MR. JUSTICE HARLAN delivered the opinion of the court.

This suit originated in one of the courts of Illinois. It is a *joint* action against two railroad corporations—the Chicago, Burlington and Quincy Rail*way* Company of Iowa, and the Chicago, Burlington and Quincy Rail*road* Company of Illinois—to recover damages alleged to have

been caused by the negligence, carelessness and improper conduct of the defendants by their agents and servants, whereby one Harold R. Wellman, the intestate of the plaintiff, was killed. The particular railroad, from the operation of which the injuries in question arose, is located wholly in Illinois and the plaintiff Willard is a citizen of that State. The case involves a question, to be presently mentioned, of the jurisdiction of the Circuit Court. It also involves a question as to the power and duty of an appellate Federal court, where it appears, *from the record*, that a subordinate court has disposed of a case of which it could not properly take cognizance, but in respect to which the parties are silent.

The facts are: The defendant, the Iowa corporation, filed its petition for the removal of this cause to the Circuit Court of the United States. It appears that in November, 1901, the Chicago, Burlington and Quincy Rail*road* Company of Illinois leased, for a period of ninety-nine years from September 30, 1901, to the Chicago, Burlington and Quincy Rail*way* Company of Iowa its line of railway and the rights, privileges, franchises, rights of way, yards, stations, tracks and all appliances thereunto belonging, including in the lease that part of the road in Illinois described in the declaration; that the lessor company also assigned to the lessee company all other real and personal property not above mentioned, and all the rights, privileges, immunities and franchises of the lessor company, except its franchise to be a corporation; that after December 21, 1901, as well as on the day of the alleged injury and death of Wellman, the Iowa company operated and was then operating, controlling and managing the railway lines of the Illinois company. At the time of the injuries complained of neither the Illinois company nor any of its servants controlled, used or operated the railroad engine or cars with which the deceased came into contact and was killed, but that the management, custody,

control and operation of the leased road and property was with the Iowa corporation exclusively; and that there was, it is alleged, a separable controversy between the Iowa company and the plaintiff, citizen of Illinois, which entitled that corporation to have the cause transferred for trial into the Federal court. It was further alleged that as the plaintiff was a citizen of Illinois, the two corporations were *fraudulently and improperly joined* as co-defendants *for the purpose of defeating the removal of the case to the Federal court.*

The state court made an order recognizing the right of the Iowa corporation to have the cause removed to the Federal court. Subsequently, in the Circuit Court of the United States, the plaintiff moved to remand the case to the state court; but a few days thereafter he was given leave to withdraw that motion and to amend his declaration. He did not renew the motion to remand, but was given leave to amend his declaration, under which privilege he made extended amendments. But we do not perceive that those amendments affect the conclusion which, in our judgment, must be reached in the determination of the cause. The case remained throughout as a *joint* action against two companies, one of which was a corporation of the State of which the plaintiff was a citizen. What would have been the effect of any amendment made by the plaintiff, in the Circuit Court, eliminating or dismissing the lessor company, the Illinois corporation, altogether as a party defendant—thus leaving the case as presenting issues between citizens of different States only—we have no occasion now to determine. A trial was had in the Circuit Court, between the plaintiff and the two corporations, without objection as to the jurisdiction of that court, and at the conclusion of the evidence the jury, by direction of the court, returned a verdict for the defendants, and a judgment was accordingly rendered for them. The case went to the Circuit Court of Appeals, where that

court, being of opinion that the record disclosed a want of jurisdiction in the Circuit Court of the United States, the judgment was reversed, with directions to remand to the state court. That action was taken by the Circuit Court of Appeals upon its own inspection of the record, and without any suggestion by either party, as to a want of jurisdiction in the Circuit Court. The case is now here upon certiorari.

Had the Circuit Court jurisdiction of this case? As the plaintiff withdrew and did not renew his motion to remand to the state court, but went to trial in the Federal court without objection, was the Circuit Court of Appeals, or is this court, precluded from considering the question of jurisdiction? These questions can have but one answer. It is firmly established by many decisions that in every case pending in an appellate Federal court of the United States the inquiry must always be whether, under the Constitution and laws of the United States, that court or the court of original jurisdiction could take cognizance of the case. The leading authority on the subject is *M. C. & L. M. Railway Co.* v. *Swan*, 111 U. S. 379, 382, where the cases are fully reviewed. In that case the question of jurisdiction was raised in this court by the party at whose instance the subordinate Federal court exercised jurisdiction. But that fact was held not to be decisive; for, said Mr. Justice Matthews, speaking for the court, "on every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." This rule was said to be inflexible and without exception, and has been uniformly sustained by this court. In *Ayers* v. *Watson*, 113 U. S. 594, 598, Mr. Justice Bradley, speaking for the court, and referring to the second section (the removal section) of

the act of 1875, said: "In the nature of things, the second section is jurisdictional, and the third is but modal and formal. The conditions of the second section are indispensable, and must be shown by the record; the directions of the third, though obligatory, may to a certain extent be waived. Diverse state citizenship of the parties, or some other jurisdictional fact prescribed by the second section, is absolutely essential, and cannot be waived, and the want of it will be error at any stage of the cause, even though assigned by the party at whose instance it was committed. *Mansfield & Coldwater Railway Co.* v. *Swan*, 111 U. S. 379." In *Cameron* v. *Hodges*, 127 U. S. 322, 326, it was held to be an express requirement of the statute that the Circuit Court shall remand a case to the court from which it was removed whenever it appears that it is not one of which the Federal court can properly take cognizance. In *Martin* v. *Baltimore & Ohio R. R.*, 151 U. S. 673, 689, after referring to the judiciary act of 1875, Mr. Justice Gray, speaking for the court, said: "Diverse State citizenship of the parties, or some other jurisdictional fact prescribed by the second section, is absolutely essential, and cannot be waived, and the want of it will be error at any stage of the cause, even though assigned by the party at whose instance it was committed." In *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 62, 63, in which both parties insisted upon the jurisdiction of the Circuit Court, the court said: "Consent of [the] parties can never confer jurisdiction upon a Federal court. If the record does not affirmatively show jurisdiction in the Circuit Court, we must, upon our own motion, so declare, and make such order as will prevent that court from exercising an authority not conferred upon it by statute." In *Thomas* v. *Board of Trustees*, 195 U. S. 207, 211: "It is equally well established that when jurisdiction depends upon diverse citizenship the absence of sufficient averments or of facts in the record showing such required diversity of citizen-

ship is fatal and cannot be overlooked by the court, even if the parties fail to call attention to the defect, or consent that it may be waived." In *Kentucky* v. *Powers*, 201 U. S. 1, 35, it was said that this court "must see to it that they [the subordinate courts of the United States] do not usurp authority not affirmatively given to them by acts of Congress"—citing *M. C. & L. M. Ry. Co.* v. *Swan*, 111 U. S. 379, 382. In *Perez* v. *Fernandez*, 202 U. S. 80, 100, which came to this court from the District Court of the United States for the District of Porto Rico—this court upon the authority of the *Swan* and other cases cited—held that "where the jurisdiction fails the objection can be raised in this court; if not by the parties, then by the court itself." There are many other authorities to the same effect, but we cite a few of the additional cases: *King Bridge Co.* v. *Otoe Co.*, 120 U. S. 225; *Continental Ins. Co.* v. *Rhoads*, 119 U. S. 237; *Peper* v. *Fordyce*, *Ib.* 469; *Blacklock* v. *Small*, 127 U. S. 96, 103, 105; *Metcalf* v. *Watertown*, 128 U. S. 586, 587; *Crehore* v. *Ohio &c. Railway Co.*, 131 U. S. 240, 242; *Graves* v. *Corbin*, 132 U. S. 571, 589; *Neel* v. *Pennsylvania Co.*, 157 U. S. 153; *Continental Nat. Bank* v. *Buford*, 191 U. S. 119, 120.

We now come to the question of jurisdiction upon its merits. If, under the statutes relating to the jurisdiction of the Federal courts, and upon the facts as disclosed by the record and litigated, the Circuit Court could not have taken cognizance of the case, then, according to the authorities above cited, it was the duty of the Circuit Court of Appeals, upon its own motion and without regard to the wishes of the parties or of either of them, to reverse the judgment of the trial court, with directions to remand the case to the state court.

We are of opinion that the Circuit Court could not properly take cognizance of this case. The action was brought by a citizen of Illinois against two companies—one a corporation of Iowa and the other a corporation of

Illinois. It is said that as, long before the injury complained of, the Illinois corporation, the legal owner of the railroad in question, had leased to the Iowa company its road, with its property, rights, privileges, yards, stations, etc., appertaining thereto (excepting only the lessor company's franchise to be a corporation), and was in nowise, by its agents or servants, in the control of the road or of its operations at the time the plaintiff's intestate was killed, the making of that corporation a party defendant in order to defeat the removal of the case to the Federal court was fraudulent and improper. A complete answer to this suggestion is that by the settled law of Illinois at the time the injury in question was received the lessor company of Illinois, although it had ceased to operate the road, was liable with the lessee company in such an action as this. The cause of action arose in Illinois, and it was entirely competent for that State in the exercise of its governmental powers to say that one of its own corporations, operating a railroad within its limits, by its authority, shall not, by leasing its road and property, be freed from liability for damages for which it would have been legally liable under its charter had it not made such lease.

In *C. & G. T. Ry. Co.* v. *Hart*, 209 Illinois, 414, the Supreme Court of Illinois, after referring to Elliott on Railroads, in which it is admitted that the weight of authority was that the lessor company, unless expressly exempted by statute, was liable for injuries caused by the negligence of the lessee company, its agents and servants, said: "We think this court is committed to the view held by the current of authorities on the question, and, moreover, that, in sound reason and as the better public policy, the doctrine should be maintained that the lessor company shall be required to answer for the consequences of the negligence of the lessee company in the operation of the road, not only to the public, but also to servants of the lessee company who have been injured by actionable

negligence of the lessee company. The charter of the lessor company empowered it to construct this line of railroad and operate trains thereon. It became its duty to exercise those chartered powers, otherwise they would become lost by non-user. The statute authorized it to discharge that duty through a lessee, and it adopted that means of performing the duty which the State had created it to perform. The statute which authorized it to operate its road by means of a lessee did not, however, purport to relieve it of the obligation to serve the public by operating the road, nor of any of the consequences or liabilities which would attach to it if it operated the road itself. (3 Starr & Cur. Stat. 1896, p. 3247.) Statutory permission to lease its road does not relieve a railroad company from the obligations cast upon it by its charter unless such statute expressly exempts the lessor company therefrom. (*Balsley* v. *St. Louis, Alton and Terre Haute Railroad Co.*, 119 Illinois, 68.) While the duty which rests upon the lessor companies to operate their roads is an obligation which they owe to the public, the permission given by the legislature, as the representative of the public, to perform that duty through lessees has no effect to absolve such companies from the duty of seeing that the lessee company provides and maintains safe engines and cars, and that the employés of the lessee companies to whom is entrusted the operation of their roads are competent and that they perform the duties devolving upon them with ordinary care and skill, for upon the character and condition of safety of such engines and cars and on the competency and care of such employés depend the lives and property of the general public. As a matter of public policy such lessor companies are to be charged with the duty of seeing that the operation of the road is committed to competent and careful hands. The General Assembly of this State, though willing to permit railroad companies to operate their lines of road by lessees, refrained from re-

lieving the lessor companies from any of their obligations, duties or liabilities. Therefore it is that though a railroad company may, by lease or otherwise, entrust the execution of its chartered powers and duties to a lessee company, this court has expressed the view [that] the lessee company, while engaged in exercising such chartered privileges or chartered powers of the railroad company, is to be regarded as the servant or agent of the lessor company."

In *West Chicago Street R. R. Co.* v. *Horne*, 197 Illinois, 250, 251, the state Supreme Court said that "the law is well settled that when an injury results from the negligence or unlawful operation of a railway, whether by the corporation to which the franchise is granted or by another corporation which the proprietary company authorizes or permits to use its tracks, both the lessor and the lessee are liable to respond in damages to the party injured"—citing *Pennsylvania Co.* v. *Ellett*, 132 Illinois, 654; *Chicago and Erie Railroad Co.* v. *Meech*, 163 Illinois, 305. In the *Ellett Case*, the language of the court was: "The law has become settled in this State, by an unbroken line of decisions, that the grant of a franchise, giving the right to build, own and operate a railway, carries with it the duty to so use the property and manage and control the railroad as to do no unnecessary damage to the person or property of others; and where injury results from the negligent or unlawful operation of the railroad, whether by the corporation to which the franchise is granted, or by another corporation, or by individuals whom the owner authorizes or permits to use its tracks, the company owning the railway and franchise will be liable." Many cases in Illinois were cited by the state court in support of its view.

It is thus made clear that if the plaintiff had any cause of action on account of the injury in question he could bring a joint action in an Illinois court against the lessor and lessee companies. Whatever liability was incurred

on account of the death of the plaintiff's intestate could, at the plaintiff's election, be asserted against both companies in one joint action, or, at his election, against either of them in a separate action. In *Powers* v. *Chesapeake & Ohio Ry. Co.*, 169 U. S. 92, 96, 97, which was an action against a railroad company and several of its servants for negligence resulting in an injury alleged to have been caused by the joint negligence or carelessness of all the defendants, the court, speaking by Mr. Justice Gray, said: "It is well settled that an action of tort, which might have been brought against many persons or against any one or more of them, and which is brought in a state court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the Circuit Court of the United States, even if they file separate answers and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said, 'A defendant has no right to say that an action shall be several which the plaintiff seeks to make joint.' A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings"—citing *Pirie* v. *Tvedt*, 115 U. S. 41, 43; *Sloane* v. *Anderson*, 117 U. S. 275; *Little* v. *Giles*, 118 U. S. 596, 600, 601; *Louisville & Nashville R. R. Co.* v. *Wangelin*, 132 U. S. 599; *Torrence* v. *Shedd*, 144 U. S. 527, 530; *Connell* v. *Smiley*, 156 U. S. 335, 340.

In the case of *Alabama Great Southern Ry.* v. *Thompson*, 200 U. S. 206, 216, 218, after referring to *L. & N. R. R. Co.* v. *Ide*, 114 U. S. 52, in which Chief Justice Waite said that a defendant had no right to say that an action shall be several which a plaintiff elects to make joint, this court,

speaking by Mr. Justice Day said: "The language is used of an action begun in the state court, and it is recognized that the plaintiff may select his own manner of bringing his action and must stand or fall by his election. If he has improperly joined causes of action he may fail in his suit; the question may be raised by answer and the right of the defendant adjudicated. But the question of removability depends upon the state of the pleadings and the record at the time of the application for removal, *Wilson* v. *Oswego Township*, 151 U. S. 56, 66, and it has been too frequently decided to be now questioned that the plaintiff may elect his own method of attack, and the case which he makes in his declaration, bill or complaint, that being the only pleading in the case, is to determine the separable character of the controversy for the purpose of deciding the right of removal," citing the above cases, and in addition *Louisville & Nashville Railroad Co.* v. *Ide*, 114 U. S. 52; *Graves* v. *Corbin*, 132 U. S. 571; *East Tennessee, V. & G. R. R.* v. *Grayson*, 119 U. S. 240; *Chesapeake & Ohio R. R.* v. *Dixon*, 179 U. S. 131; *Southern Ry.* v. *Carson*, 194 U. S. 136. Again, in the same case: "Does this become a separable controversy within the meaning of the act of Congress because the plaintiff has misconceived his cause of action and had no right to prosecute the defendants jointly? We think in the light of the adjudications above cited from this court, it does not. Upon the face of the complaint, the only pleading filed in the case, the action is joint. It may be that the state court will hold it not to be so. It may be, which we are not called upon to decide now, that this court would so determine if the matter shall be presented in a case of which it has jurisdiction. But this does not change the character of the action which the plaintiff has seen fit to bring, nor change an alleged joint cause of action into a separable controversy for the purpose of removal. The case cannot be removed unless it is one which presents a separable controversy wholly

between citizens of different States. In determining this question the law looks to the case made in the pleadings, and determines whether the state court shall be required to surrender its jurisdiction to the Federal court."

It results that upon the face of the record the action throughout was proceeded in as a joint action, and that there was no separable controversy, in such an action, entitling the Iowa corporation, as matter of law, to remove the case from the state court. And it cannot be predicated of the plaintiff that he fraudulently and improperly made the Illinois corporation a co-defendant with the Iowa corporation when such a charge is negatived, as matter of law, by the fact that the plaintiff was, as we have seen, entitled under the laws of Illinois, where the cause of action originated and within which the road in question was located, to bring a joint action against the Illinois and Iowa companies. *Ill. Central R. R. Co.* v. *Sheegog*, 215 U. S. 308, 316. He may have preferred to have the case tried in the state court, just as the Iowa corporation preferred the Federal court. But these preferences or motives, not fraudulent or unnatural, were of no consequence. They were immaterial in determining whether the plaintiff had a legal right to bring a joint action against the lessor and lessee companies and to carry it on in that form to a conclusion. The silence of the parties, at the trial, or in the appellate court, on the question of jurisdiction could not, in disregard of the judiciary act, confer authority on the Circuit Court to try the case. The Circuit Court of Appeals, therefore, properly, of its own motion, reversed the judgment of the trial court and sent the case back to the Circuit Court, with instructions to remand it to the state court. Restricting this opinion to the case made by the record before us, and as litigated, and without imagining cases in which the rules herein announced might be difficult to apply, the judgment is

Affirmed.